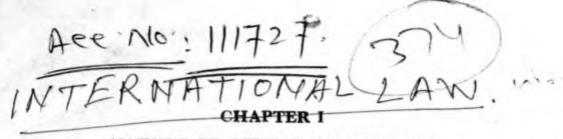
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## NATURE OF INTERNATIONAL LAW

Its Importance. A modern State cannot lead an isolated life in the sesent context of world affairs. The more a State is civilized and perfect in organization, the greater and more intimate shall be its intercourse with ier States. This inevitably leads that a government of a State must not only anduct its internal affairs but also regulate its conduct towards the governents and peoples of other States. Harmony in political ideas, art and prature, scientific discovery, the exchange of embassy for the purpose of crying on international intercourse and commerce all tend to knit States gether in a social bond. Nothing can distort the true picture of conditions ad events in this world more than to regard one's own country as the centre the universe, and to view all things solely in that perspective. Wendell illkie's conception of "One World" is no more a wishful thinking of a vain olitician, but a hard reality and a plain truth which cannot be ignored. ith the highly improved means of communications the world has become ry close and any event occurring in any part of the globe is bound to have repercussion on the other. The world has shrunk by way of quick communition facilities and expanded in social dimensions. The bi-polar world is coming a thing of the past. Normally the inhabitants of one country quently visit the territory of another, and no State can, with any degree of acticability or effectiveness, close its frontiers with a Great Wall of China so to prevent its citizens from travelling abroad or to exclude foreigners from s own territory. The need of foreign trade further necessitates the mainteince of relations with other States. Just as men could not live together in a ciety with out laws and customs to regulate their actions, so States could not we mutual intercourse without usages and conventions to regulate their nduct. The conduct of individuals or subjects of a State is governed by unicipal law, while that of States inter se or members of the Family of Nations the Society of States by International Law.

Its Origin.—The term International Law was first coined by Jeremy on tham in 1780. It is synonymous with law of nations which corresponds to it French and German equivalents droit des gens; Volkerrecht.

Bynkershoek ascribes the origin of the law of nations to reason and usage ratione et usu basing usage on the evidence of treaties and ordinances (pacta et licta). In another context he observes: "Reason commands me to be equally iendly to two of my friends who are enemies to each other; and hence it ollows that I am not to prefer either in war."

Before discussing the exact connotation of the term 'International Law', will be helpful to set out the definitions put forward by some of the eminent athors, jurists and publicists and those given in some of the leading cases on

Definitions of International Law.—Lawrence, the well-known English trist, defines International Law as "the rules which determine the conduct of the general Lody of civilized States in their mutual dealings." A great part of International Law consists of rules for carrying on war apart from interna-

tional intercourse. Disharmony in mutual relations among independ sovereign States causes rupture in their dealings; their unregulated relati ship is the only condition in human society that creates war. Internatio Law, therefore, regulates the conduct of States in their mutual dealings, host il as well as pacific.

According to Oppenheim, Law of Nations or International Law (D) des gens, Volkerrecht) is the name for the body of customary and treaty rules while are considered legally binding by civilized States in their intercourse with care other.

"International Law consists in certain rules of conduct which modern civilized States regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement."2

International Law is the body of principles and rules which civil dec States consider as binding upon them in their mutual relations. It rests upon

the consent of sovereign States.3

"The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized States in their relations with one another."4

"International Law or the Law of Nations is the name of a body of rules which-according to the usual definition-regulate the conduct of the States in their intercourse with one another."8

International Law may be defined in broad terms as the body of general principles and specific rules which are binding upon the members of the international community in their mutual relations.

The general principles and specific rules embody both the substantive law, which defines the mutual rights and duties of States, and the adjective law, or law of procedure, which prescribes the means by which rights recognised by the community of nations may be enforced with the sanction of the community.

By the Law of Nations, or International Law, should be understood the sum of the rules of conduct observed by the various nations in their relations with one another; in other words, the sum of the mutual obligations of States that is to say, the duties which they must perform and the rights which they must defend with respect to one another.?

Public International Law is that body of customs, rules, and princip which are recognized as binding upon all States and other international personal

The Law of Nations is the science of the rights which exist between nations or States, and of the obligations corresponding to these righ,

Dr. Alf Ross accepted that according to the current view Internation Law is the body of legal rules binding upon states in their relations with o

L. Oppenheim . International Law-A, Treatise, Vol. I, 8th Ed., p. 4.

Hall . Internation I Law, 8th Ed., p. 1. 3. Hughes: Am. Bar Ass Journal XVI (1930). 153.

4. J. L. Brierly : The Law of Nations, Sixth Ed. p. 1. Hans Kelsen: Principles of International Law, p. 3. 6. Charles G. Fenwick: International Law, (1967), p. 31

7. Colvo: Le Droit International, S. 1.

Oscar Svarlien: An Introduction to the Law of Nation, p. 62.

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lati British Law, German Law, Danish Law, which is called by a common name to internal law, national law, state law, or municipal law. This definition envisages International Law as a legal system connected with a certain society, the society of states. It is a separate legal system associated with a certain thuman society, which is not a new society co-ordinate with the British, of German, or Danish society, but is a larger, more comprehensive community of the moracing all these as parts of a whole.

The above view of International Law, according to Dr. Ross, is, however, extremely incomplete as long as no clear definition is given of what is meant by a 'state', The term 'state' is defined by its sovereignty. Sovereignty is defined as sole subjection to International Law, that is to say, as the quality of being subject to International Law alone, not to state law. But in that case the definition given of the term "International Law" would be unmeaning. Dr. Ross says that the term "International Law" is here defined with reference to the term 'state' and the definition of the term 'state' again refers back to the term International Law". A definition thus biting on its own tail is circular. The consequence is that on the point in question the definition is in reality a blank.

In order to make the current definition of International Law consistent, Dr. Ross says that the object must be to find a criterion for the term 'State' which shall not be circular and at the same time shall justify a fundamental division of all law into the species "Internal Law" and "International Law" so that these concepts shall cover the phenomena which usually go by these designations. He offers the solution by suggesting the hypothesis that the current definition of the term "International Law" (as the law valid for States in their relations with each other, may be rendered more complete by replacing the term "state" implied in it by "a self-governing legal community."

On this view Dr. Ross is of opinion that International Law may conveniently be defined as the law valid for (binding upon) self-governing communities, the chief distinguishing mark being, then, that it is never directly binding upon individuals but must always be rendered effective through the medium of the internal law of the self-governing communities.<sup>2</sup>

International Law may be described as "the sum of the rules accepted by civilised States as determining their conduct towards each other, and towards each other's subjects.".

International Law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent.

International Law is the body of legal rules which apply between sovergign States and such entities as have been granted international personality.

International Law is that code of public instructions which defines the ights and prescribes the duties of nations in their intercourse with each other. Kent).

2. Ibid., p. 17.

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5. Georg Schwarzenberger: A Manual of International Law, 5th Ed., p. 3.

<sup>1.</sup> Dr. Alf Ross A Text-book of International Law, pp. 11-12.

Pitt Colbett: Cases on International Law, 5th Ed., p. 4.
 Henry Wher ton: Elements of International Law, Third English Edition, p. 22.

International Law is the aggregate of the rules which determine the rights which one State is entitled to claim on behalf of itself or its nationals

The Law of Nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes to regulate all ceremonies and civilities and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent States, and the individuals belonging to each. (Blackstone).

International Law may be defined as the "rules of conduct regulating the intercourse of States." (Hallack)

"The Law of Nations is a complex system, composed of various ingredients. It consists of general principles of right and justice, equally suited to the conduct of individuals in a state of natural equity, and to the relations and conduct of nations, of a collection of usages, customs and opinions, the growth of civilization and commerce, and a code of positive law."2

Public International Law embraces the ascertainable and recognized rules that guide the conduct of public corporate entities comprising the international community. International Law is public law even in matters

It will appear from the above definitions that the older writers adhered strictly to the rules of obligations between the States and emphasized the sources, viz., reason, justice and custom, in their concept of International Law, while the modern writers include a wide variety of rules in force which are not necessarily of legal obligation, operating on the basis of mutual cooperation. The latest trend is to treat International Law as a social process involving complex patterns of interaction and amenable to newly developed behavioral and contextual tools of social and legal analysis.4

According to Starke, International Law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also :

- (a) the rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with States and individuals; and
- (b) certain rules of law relating to individuals and non-State entities so far as the rights or duties of such individuals and non-State entities are the concern of the international community. 5

The above definition by Starke, which is an adaptation of the definition of International Law by the American authority, Professor Charles Chency Hyde, makes a departure from the traditional definition of International Law as a system composed solely of rules governing the relations between States only.

 Sir Cecil Hurst: International Law: The Collected Papers, p. 8.
 Sir Henry Maine: International Law (1883), p. 33.
 Wesley L. Gould: An Introduction to International Law (1956), p. 135.
 Professors Wesley L. Gould and Michael Backup: International Law (1956), p. 135. 4 Professors Wesley L. Gould a d Michael Barkun: International Law and Social Sciences with a Preface by Professor 1 arold 1 asswell, President of the American Society of

5. J. G. Starke : An Introduction to International Law, 5th Ed., p. 1.

In view of post-war developments which have brought about the emergence of international institutions or organisations, such as the United Nations, the International Labour Organization, and the World Health Organization, regarded as possessing international legal personality, and entering into relations with each other and with States, and the present movement to protect human rights and fundamental freedoms of individuals, the orthodox definitions of International Law have become obsolete. Nevertheless, from the practical point of view, the old definitions of International Law represent a great deal of truth. It is primarily a system regulating the rights and duties of States inter se and that is why it is also termed as the law of nations, although strictly speaking the word 'nation' is only in a crude way a synonym for the word 'State'.

In R. v. Keyn (The Francoma), 2 Lord Coleridge, C. J., observed that the law of nations is that collection of usages which civilised States have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be a matter of evidence.

In the famous case of West Rand Central Gold Mining Co. Ltd., v. The King<sup>3</sup>, Lord Alverstone, C. J. adopted the definition given by Lord Russell of Killowen in his address at Saratoga in 1896 by saying that he knew no better definition of International Law than that it is the sum of the rules or usages which civilised States have agreed shall be binding upon them in their dealings with one another.

In the S. S. Lotus case<sup>4</sup> between France and Turkey, International law was defined by the Permanent Court of International Justice "as meaning the principles which are in force between all independent nations." This definition embraces two essential features of International Law, viz., its universality and its exclusiveness. The emphasis is laid on the words "independent nations", inasmuch as according to the Permanent Court of International Justice the principles in force relate not to all nations but to all independent nations.

It was observed by Gray, J. in The Paquete Habana v. United States that International Law was part of the law of the United States and must be ascertained and administered by the Courts of Justice of appropriate jurisdiction... For this purpose, where there was no treaty, no controlling executive legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these to the works of jurists and commentators who by years of labour, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat.

The various definitions set out above indicate the differing stress put on the sources from which International Law, according to the various writers, seems to have been derived. The earlier writers laid stress on doctrines of natural law, natural reason and justice, while the modern writers seem to comprehend within its orbit rules of law relating to individuals and non-State entities so far as their rights and duties concern the international community, and regard customs and treaties as the main sources of law. The orthodox view that the individual is not a subject of International Law is a 'legal fossil' and 'a remnant of legal animism'. International Law today is not an orphan child of jurisprudence. It has a jural basis and exists for "equitable and just regulation of inter-unit relations within the world community.")

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Starke : An In roluction to International Law, 4th Ed., pp. 1-1.
 (1876) 2 Ex. D. 63.

<sup>3. (190 ) 2</sup> K, B, 391. 4. (1927 P. C. I. J. Series A. No. 10. (1900) 175 U. S. 677.

In this view of the matter, International Law may be deemed to consist of net only principles and rules of conduct which States consider as binding among themselves but also rules concerning the functioning of international organizations and institutions as also rules of law relating to individual and non-State entities so far as their rights and duties concern the international community or which in certain cases confer rights or impose international obligations on them. International Law appears essentially to be rules which have the general agreement of States. 7

Public International Law and Private International definitions enumerated above relate to Public International Law as it is often termed. "Private International Law is a body of principles for determining questions of jurisdiction, and questions as to the selection of the appropriate law, in civil cases which present themselves for decision before the Courts of one State or county, but which involve a 'foreign element', i. e., which affect foreign persons, or foreign things, or transactions that have been entered into wholly or partly in a foreign country, or with reference to some foreign system of law." It is concerned with legal relations under municipal law having foreign element.

"The objects of private International Law are, first, to prescribe the conditions under which the court is competent to entertain a suit, secondly, to determine for each class of cases the particular territorial system of law by reference to which the rights of the parties must be ascertained and, thirdly, to specify the circumstances in which (a) a foreign judgment can be recognized as decisive of the question in dispute; and (b) the right vested in the creditor by a foreign judgment can be enforced by action in England."

Private International law is different in each country; there is consequently no affinity between Private and Public International Law. The latter, as discussed above, comprises those universally accepted customs which are recognised by States in their public relations with each other ; the former consists of rules which the courts of each territorial jurisdiction follow when a dispute concerning some foreign element arises between private persons. Private Inter. ational Law is essentially part of municipal law.2 Dicey calls it as Conflict of Laws since it deals with rules regulating cases in which municipal laws of different States come into conflict. Such conflicts may arise in connection with domicile, marriage, divorce, wills, validity of contracts, etc. It is also known as inter-municipal law, international comity, etc. "Only in exceptional circumstances do rules of conflict of laws become rules of international law proper, as for instance when they are incorporated in

The Permanent Court of International Justice observed in the Serbian Loans Case4, that the rules of private International Law may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true International Law governing the relations between States. But apart from this it has to be considered that these rules form part of municipal law.

According to Sir Robert Phillimore, rights arising under Public International Law are called absolute, or rights stricti juris, and their breach

<sup>1.</sup> Pitt Cobbett's Cases on International Law, Vol. I, 5th Ed., pp. 239-240.
2. G. C. Cheshire: Private International Law, pp. 1 & 19.

<sup>3.</sup> Schw arzenberger A Manual of International Law, Second Edition p. 2.

constitutes a casus belli, and justifies in the last resort a recourse to war, whereas Private International Law—the rules of which are founded upon convenience, and intended to facilitate the intercourse between the subjects of different States—confers no absolute rights. For a want of comity towards the individual subjects of a foreign State, reciprocity of treatment by the State, whose subject has been injured, is, after remonstrance has been exhausted, the only legitimate remedy.

Private International Law is a distinct branch of jurisprudence which has as its major topic the body of rules determining which territorial system of law controls private law cases that have roots in more than one country or, in a federation, in more than one State, canton or province. Violations of private international law by a State may also constitute violations of public international law if they are also breaches of treaties agreeing to follow certain practices in relation to the former. Public international law is a product not of the relations of private persons but of the relations of States to each other and to public international organizations.<sup>1</sup>

Subject matter of International Law. — Public International Law, the subject of our study, may conveniently be divided into the Laws of War and Peace. "International Law," observes Professor Edwin M. Borchard, "is concerned with the classification of States according to their degree of independence; their recognition and admission to the international community; the extent of national territory; the limitations upon national jurisdiction; rights upon the high seas and in international channels of communication and transit; the position of agents of the State, such as consuls and diplomatic officers; international ceremonials; extradition; the international responsibility of States to other States for injuries to aliens; the conflicting laws of citizenship; the conclusion, interpretation and termination of treaties; and means of redress for alleged injury, from pacific measures, such as diplomatic representation, mediation and arbitration, to the forcible prosecution of claims and interests leading up—to war and including the vast complex of rules governing the relations of belligerents and neutrals in time of war."

It will appear from the above that International Law is primarily a law of peace governing the relations of States in their intercourse with one another. It is only at the time of conflict and declaration of war that the laws of warfare and the rights and obligations of belligerents and neutrals come into play.

Dr. Jenks divides the contemporary law of peace into eight main divisions, viz. a) the law governing the structure and law-making processes of the international community; (b) the law governing the relations between States, which includes the rules concerning territory, the freedom of the seas and sovereignty of the air, jurisdiction, the responsibility of states, intercourse between States, etc; (c) human rights protected by international guarantees, including civil liberties and political, economic, and social rights; (d) property rights of a distinctively international character, including incorporeal forms of property such as copyright and patents and certain contractual and other financial claims; (c) common rules established by international instruments which do not apply primarily to inter-State relations, a division which comprises a large part of the content of modern law-making treaties and covers the whole range of economic and technological inter-dependence, including aviation, much of maritime law, postal matters, etc.; (f) international rules governing the conflict of laws; (g) the law of treaties and other international

<sup>1.</sup> Wesley L. Gould · Ar. Introduction to International Law, p. 135.

instruments, including the conclusion, validity, effect, interpretation, termination and modification of such instruments, and (h) the law governing international arbitration and judicial settlement, including jurisdiction, procedure, interim measures of protection, evidence, damages and the execution of decision and awards.<sup>1</sup>

The laws of war, as said above, regulate the rights and obligations of belligerents and neutrals when the law of peace has been suspended in time of war.

The end of the Second World War witnessed the development of international institutions and specialized agencies, and the rules regulating their status and functions also form part of International Law or, as sometimes called, International Constitutional Law.

## Is International Law True Law?

Almost from the early stages of the development of the science of the Law of Nations the question whether /International Law is law in the true sense has been a subject of much speculation. Has it any binding force? International lawyers have themselves engaged in doctrinal disputes regarding the binding nature of International Law. Opinion has sharply been divided on this vexed question. The leading English writer on Jurisprudence, John Austin, maintained during the nineteenth century that International Law is not true law, but a code of rules of conduct of moral force only. Hobbes and Pufendorff, who preceded Austin, also answered the question in the negative by observing that there is no positive law of nations properly invested with a true and legal force, and binding as the command of a According to Vattel, the Law of Nations, in its origin, is nothing but the law of nature applied to nations. Holland maintained that International Law differed from ordinary law in being unsupported by the authority of a State. According to him, the Law of Nations is but private law 'writ large.' In this view of the matter, he called International Law as the vanishing point of Jurisprudence. Bentham also criticised International Law as the law proper. On the other hand, eminent authorities like Hall and Lawrence maintain that International Law not only operates as law but is distinct from international morality by a radical difference both in the nature of its rules and sanctions. The former observes that International Law is habitually treated as law and that a certain part of what is at present acknowledged to be law is indistinguishable in character from it; the latter emphasises that International Law is generally observed by States, though here and there like other law some of its commands are disregarded. But it is no more reduced to a nullity by being sometimes broken, than are the laws of the land, because the habitual criminal disregards them with impunity.

It is thus clear that the solution of the above question depends on the definition of law which one may choose to adopt.

Austin holds that International Law is no law as it does not emanate from a law-giving authority and has no sanction behind it. He observes that the law obtaining between nations is not a positive law for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. The law obtaining between nations is, according to him, only law set by general opinion and the duties which it imposes are enforced by moral

1. C/f C. W. Jenks: The Scope of International Law. The British Year Book of International Law, 1954, p. 10.

sanction. There is no compelling sanction derived law based on natural inasmuch as there is no sovereign power over and above in came later to be He describes International Law as "positive international morant, of "opinions or sentiments current among nations generally."

Holland, as stated above, subscribes to the view taken by Austin. According to him, "such rules as are voluntarily, though habitually, observed by every State in its dealings with the rest can be called law only by courtesy." It is not supported by the authority of a State. It is the vanishing point of jurisprudence, since it lacks any arbiter of disputed questions save public opinion, beyond and above the disputant parties themselves and since in proportion as it tends to become assimilated to true law by the aggregation of States into a large society, it ceases to be itself, and is transmuted into the public law of a federal government.

According to Lord Salisbury, International Law cannot be enforced by any tribunal and therefore to apply to it the phrase 'law' is to some extent misleading.

According to Jethro Brown, International Law is the law in the making, law struggling for existence. It is struggling to make itself good in contradistinction from international morality.

No doubt, International Law is less imperative and less explicit than the State law but nevertheless it is law inasmuch as it is enforced partly by the conviction that it is good and partly by those subtle influences which make it difficult for a man or body of men to act in defiance of strongly held views of those with whom they associate. Compulsion alone is not the sanction behind law. It is enforced by the consideration of justice as much as of force! The element of fear is also not absent. Nations are afraid that a gross violation of international rules of conduct might make the nemesis fall on them/ 3 Like ordinary law International Law is also sometimes evaded but that does not mean that the law does not exist As Mr. Roosevelt said in his last Annual Message to Congress: "It would be preposterous to think that international relations are governed exclusively by force, and that statesmen are not moved by considerations of right and law and justice." In the words of Brierly, "it is not the existence of a police force that makes a system of law strong and respected, but the strength of the law that makes it possible for a police force to be effectively organised.?

The objection as to International Law being treated as law proper comes in the main from the followers of writers such as Hobbes and Austin, who regard nothing as law which is not the will of a political superior. "But", observes Brierly, "this is a misleading and inadequate analysis even of the law of a modern State; it cannot, for instance, unless we distort the facts so as to fit them into the definition, account for the existence of the English Common Law... Most of the chracteristics which differentiate International Law from the law of the State and are often thought to throw doubt on its legal character, such, for instance, as its basis in custom, the fact that the submission of parties to the jurisdiction of courts is voluntary, the absence of regular processes either for creating or enforcing it, are familiar features of early legal systems;... If, as Sir Frederick Pollock writes..., the only essential conditions for the existence of law are the existence of a political community, and the recognition by its members of settled rules binding upon them in that capacity, International Law seems on the whole to satisfy these conditions".

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<sup>1.</sup> J. L Brierly: The Law of Nations, 6th Ed., pp. 70-71.

are criticising the Austinian conception of law sometimes obey rules for fear of punishment but comas of men in each community this class is but small, probably and to what are called the criminal classes. The largest number of rules which men obey are obeyed unconsciously from a mere habit of mind.1

Starke repels the Austinian theory on the following grounds: A

(a) Modern historical jurisprudence has discounted the force of his general theory of law. It has been shown that in many communities without a formal legislative authority, a system of law was in force and being observed, and that such law did not differ in its binding operation from the law of any State with a true legislative authority.

Austin's views, however right for his time, are not true of presentday International Law. In the last half-century, a great mass of "international legislation" has come into existence as a result of law-making treaties and Conventions, and the proportion of customary rules of International Law has correspondingly diminished.

(c) Questions of International Law are always treated as legal questions by those who conduct international business in the various Foreign Offices, or through the various existing international administrative bodies.2

Lord Russell of Killowen also agreed with this view when he observed that even in societies in which machinery exists for making law in the Austinian sense, rules or customs grow up, which are laws in a very real sense of the word. As governments become more frankly democratic, resting broadly on the popular will, laws bear less and less the character of commands imposed by coercive authority and acquire more and more the character of customary law founded on consent, and in this sense the aggregate of rules to which nations have agreed to conform in their conduct towards one another are properly to be designated International Law.3

Modern writers like Hall and Lawrence treat International Law as law in the proper sense. According to them, International Law is habitually treated and enforced as law; like certain kind of positive land it is derived from custom; precedent forms a source of International Law also as it does of positive law and the observance of its rules is compulsory. Pitt Cobbett observes that International Law must rank with law and not with morality. Its rules are not optional but compulsory and they rest in the last resort on force, even though that force is exerted through the irregular action of society than by some definite and authorised body.

Sehuman classifies the sanction of International Law in order of their importance as (1) habit, (2) expediency, (3) good faith and (4) organised force.

Then, international rules are applied by the International Court of Justice and the idea of sanction in international relations has been taking shape institutionally in the United Nations Organization, inasmuch as international customs, treaties and arbitration agreements have given rise to a body of well settled principles which, in the normal intercourse of States, limit their activities in the same way as the Law of England limits the activities of its citizens.

1. Sir Henry Maine : International Law, p. 50.

2. Starke, J. G. : An Introduction to International Law, 5th Ed., p. 17.

g. Address at Saratoga (1896).

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(ii) jus gentium or the law of nations being the law which they had in common with other nations. It was the law based on natural reason designed for all mankind. The jus gentium came later to be known as the jus naturals.

The Roman jurists had at first little respect for jus gentium, which was evolved out of sheer political necessity. That law was meant for settling disputes, when one of the parties was an alien, and consisted of a body of rules found prevalent among the communities on the Mediterranean seaboards. The Romans had accordingly as little regard for jus geutium as for the foreigners from whose institutions and from whose customs and usages it was derived and to whom they were disinclined to lend the advantage of their own indigenous law, viz., jus civile. A complete revolution in the ideas of the Romans was, therefore, a pre-requisite for the universal application of the jus gentium. This was achieved with the conquering of Greece by Rome and the consequent adoption of the Greek theory of the Law of Nature. This philosophical doctrine of the Law of Nature soon made rapid strides in Roman society, and the Praetor in framing an Edictal Jurisprudence on the principles of jus gentium nelped to restore the law of nature in the affairs of the Romans by superseding their civil law. The result was that "the Romans looked upon jus gentium as a concrete embodiment of the Law of Nature and identified the jus gentium with the jus naturale as it agreed well enough with the rule of Natural Law, so far as these could be observed in practice."

Cicero, therefore, rightly observed that there is indeed a true law (lex), right reason agreeing with nature, diffused among all men unchanging, everlasting. It is not allowable to alter this law, nor to derogate from it, nor can it be repealed. We cannot be released from this law, either by the practor or by the people, nor is any person required to explain or interpret it. Nor is it one law at Rome and another at Athens, one law today and another hereafter, but the same law, everlasting and unchangeable, will bind all nations at all times; and there will be one common lord and ruler of all, even God, the framer and proposer of the Law.

Maine on Law of Nature—Sir Henry Maine emphasizing the importance of the idea of the Law of Nature in modern International Law observes in his "Ancient Law" that the grandest function of the Law of Nature was discharged in giving birth to modern International Law and the modern law of war. Among the postulates which form the foundation of International Law, as laid down by its original architects, there are three of preeminent importance. The first of the postulates, which form the foundation of International Law, is that there is a determinable law of nature. Grotius, the founder of modern International Law, and his successors borrowed this assumption directly from the Romans, but they took an altogether different view from the Roman jurisconsults, and from each other, in their ideas as to the mode of determining it.

The second of the postulates is that natural law is binding on States inter se. Commonwealths are relatively to each other in a state of nature and natural law is consequently binding on States amongst themselves. The truth, however, is that modern International Law, undoubted as its descent is from Roman law, is only connected with it by an irregular filiation. The proposition which emerges from the above is that independent communities, however different in size and power, are all equal in the eye of the law of nations.

The third postulate is that sovereignty is territorial and sovereigns inter set are to be deemed not paramount, but absolute, owners of the State's territory.

The Medieval Conception: - During the Middle Ages the conception of law of nature was identified with divine law. The Church gave it a place in the doctrinal system. By virtue of being identified with the law of God, the law of nature acquired a far superior authority than man-made laws. Much of what medic writers spoke was closely related to theology and ethics, though they also dealt with topics falling within the domain of International

"The medieval conception of a law of nature", observes Brierly, "is open to certain criticisms. In the first place, when all allowances have been made for the aid afforded by Roman law, it has to be admitted that it implied a belief in the rationality of the universe which seems to us to be exaggerated. It is true that when medieval writers spoke of natural law as being discoverable by reason, they meant that the best human reasoning could discover it and not, of course, that the results to which any and every individual's reasoning led him was natural law. The foolish criticism of Jeremy Bentham: 'a great multitude of people are continually talking of the law of nature; and then they go on giving you their sentiments about what is right and what is wrong, and these sentiments you are to understand, are so many chapters and sections of the law of nature', merely showed a contempt for a great conception which Bentham had not taken the trouble to understand ... In the second place, when medieval writers spoke of natural law as able to overrule positive law in a case of conflict, they were introducing an anarchical principle which we must reject. But this was a principle which died hard, and even in the eighteenth century Blackstone could write: 'This law of nature being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe in all countries and at a times; no human laws are of any validity, if contrary to this.' In Blackstone however, such words were mere lip-service to a tradition, and had no effect on his exposition of the law."1

Brierly futher observes that these valid criticisms do not, however, affect the permanent truths in the conception of a law of nature, and the validity those truths is recognized as fully as ever. "For one thing the law of natur stands for the existence of purpose in law, reminding us that law is not a meaningless set of arbitrary principles to be mechanically applied by courts, but that it exists for certain ends, though those ends may have to be differently formulated in different times and places."2

Law of Nature before Grotius .- The disintegration of the Holy Roman Empire and the diminishing influence of the Popes as a body no doubt greatly affected the influence of the Law of Nature, but the rudiments of the law which had gained ground earlier did not altogether wither away. The 15th century, however, witnessed the revival of arts and letters, marking the transition from the Middle Ages to the modern world. The New World wa also discovered. And these factors widened the scope of International Law and the need for mutual intercourse between nations. The Spanish theologian Vitoria (1480-1546) enunciated in clear terms the principle that the nations of the world constituted a community, based upon natural reason and social intercourse. In 1582 Balthazar Ayala (1548-1584) published at Douai his De Jure et Officis Bellicis and advocated the doctrine of jus naturale and jus gentin established by common consent. Then follows Albericus Gentilis (1552-160 an Italian Protestant, who had to fice to England on account of his Protestant views. He published his work De Jure Bell Libri Tres in 1598 and emphasize the existence of the law of war based on natural reason and consent. Last of

2. Ibid., p. 23.

<sup>1.</sup> Brierly: The Law of Nations, 6th Ed., pp. 20-22.

GROTIUS 43

all comes the Spanish Jesuit Franciso Suare? (1548-1617) who published his work Tractatus de Legibus et Deo Legislatore in 1612. He laid emphasis on the moral obligation of the jus gentium, and observed that the various States although independent were nevertheless members of the human race bound by a law of conduct based upon natural reason and custom. He emphasized the moral unity of mankind and a society of States governed by the law based on natural reason and general custom, which in the ultimate analysis depended on God.

Grotius (1583-1645).—Huig van Groot¹ popularly known as Hugo Grotius born at Delft in Holland in 1583, has been acclaimed as "Father of the Law of Nations". His most important work, D. Jure Belli ac Pacis, was published in France. His main plank was to find rules of the Law of Nations which were eternal, unchangeable and independent of the consent of the States. "The leading object of Grotius, and of his immediate disciples and successors, in the science of which he was the founder", observes Wheaton,² "seems to have been, first, to lay down those rules of justice which would be binding on men living in a social state, independently of any positive laws of human institution; or, as is commonly expressed, living together in a state of nature; and, secondly, to apply those rules, under the name of Natural Law, to the mutual relations of separate communities living in a similar state with respect to each other.".

In respect of the first of the two objects Grotius repelled the view of those who denied the reality of moral distinctions. He observed that "natural law lis the dictate of right reason, pronouncing that there is in some actions a moral obligation, and in other actions a moral deformity, arising from their despectable suitableness or repugnance to the rational and social nature, and that, consequently, such actions are either forbidden or enjoined by God, the Author of Nature. Actions, which are the subject of this exertion of reason, are in themselves lawful or unlawful and are, therefore, as such necessarily commanded or prohibited by God."

Grotius started with the proposition that there is a universal and sumutable law of nature, which constitutes a large part of the law of nations. He maintained that nations as well as men ought to be governed by the universal principle of essential morality and divine justice.

Grotius opined that rights common to all were conferred not by statutes and ordinances of a particular State, but were derived from natural law, which is "the dictate of right reason indicating that any act, from its agreement or disagreement with the rational nature, has in it a moral turpitude or a moral necessity. Such law remained immutable.

Grotius differentiated between the law of nations and natural law by their origin and attributed to the former the general consent of nations.

Grotius observed that the relations of peoples were subject to jus gentium (the law of nations). Just as in each State the civil law looks to the good of the State, so there are laws established by consent which look to the good of the great community of which all or most of the States, are members, and these laws make up jus gentium. This view of jus gentium is different from what the term connoted to the Romans. There it stood for that part of the private aw of Rome which was common to Rome and other peoples, i. e., common law at nations. To Grotius it meant the established rules of custom approved by the common and tacit consent of the States being members of the international community. According to Grotius it came to be a branch of public law, overning the relations of people among themselves.

See, ante, pp. 34, 35.

<sup>2.</sup> Wheaton: Elements of International Law, 1936 Ed., p. 3.

Grotius did not identify justice with morality. Justice, according to him, was the highest utility, "and merely on that ground neither a State nor the community of States can be preserved without it. But it is also more than utility, because it is part of the true social nature of man, and that is its real title to observance by him."

Applying the above principles to war, he observed: "It is so far from being right to admit, as some imagine, that in war all rights cease, that war ought never to be undertaken except to obtain a right, nor, when undertaken, ought it to be carried on except within the bounds of right and good faith... Between enemies those laws which nature dictates or the consent of nations institutes are binding."

Lawrence assigns three reasons for the influence exercised by Grotius. In the first place, the evils due to the banishment of morality from international concerns had become so foul that they stank in the nostrils of all but the vilest of mankind. The very cause which impelled Grotius to write impelled men to heed his words. Secondly, Grotius brought to the performance of his great task all the resources of a most acute intellect and a most marvellous erudition. Thirdly, Grotius was in a very true sense the heir of the Middle Ages. The school-men and the canonist reverenced Roman Law. Grotius drew from it whole categories of international rules. The feudal lawyers connected political power and land. Grotius regarded sovereignty as territorial. Theologians, jurists, and philosophers had for centuries appealed to a law of nature. Grotius maintained that it regulated the intercourse of States. The secret of his success lay in his conservative use of approved ingredients.

Richard Zouche.—(1590-1660).—There is yet an Englishman, Richard Zouche who gained the title of "Second Founder of the Law of Nations." He advocated the customary Law of Nations and in that he differed vitally from Grotius; but he did not discard the natural law of nations altogether as one of the bases of International Law.

Hobbes and Pufendorf.—Hobbes divided the natural law into the natural law of men and the natural law of States, commonly called the Law of Nations. He observed that "the precepts of both are the same; but since States, when they are once instituted assume the personal qualities of individual men, that law, which when speaking of individual men we call the Law of Nature, is called the Law of Nations when applied to whole States, nations, or people."

Samuel Pufendorf (1632-1694) subscribed to the views of Hobbes and added that "there is no other voluntary or positive law of nations properly invested with a true and legal force, and binding as the command of a superior power." He denied any binding force to the practice of nations.

Cornelius Van Bynkershoek.—He based the law of nations on reason and usage and gave the origin of usage to the evidence of treaties and ordinances. He held that custom must be explained and controlled by reason which he referred as ratio juris gentium magistra.

Wolff.—Wolff coming after Bynkershoek resorted to the laws of positive institution by observing that strict law of nature could not always be applied to the government of a particular community and it became necessary to establish a law of positive institution more or less varying from the natural law of nations. He remarked that the voluntary law of nations derived its force from the presumed consent of nations, the conventional from their express consent; and the consuetudinary from their tacit consent.

<sup>1.</sup> Brierly! The Law of Nations, 6th Ed., p. 31.

Vattel.—He observed that the Law of Nations, in its origin, was nothing more than the law of nature applied to nations. He said that it was the essence of all civil society (civitas) that each member thereof should have given up a part of his rights to the body of the society, and that there should exist a supreme authority capable of commanding all the members, of giving to them laws, and of punishing those who refused to obey. Nothing however like that could be conceived or supposed to exist between nations. Each sovereign State pretended to be, and in fact was, independent of all others.

He accepted the doctrine of the state of nature and observed: "Nations being composed of men naturally free and independent, and who before the establishment of civil societies lived together in the state of nature; nations or sovereign States must be regarded as so many free persons living together in the state of nature."

Both Wolff and Vattel coined the expression necessary law of nations being the application of the natural law to regulate the conduct of nations in their mutual intercourse. "It is necessary", observes Wheaton, "because nations are absolutely bound to observe it. The precepts of the natural law are equally binding upon States as upon individuals, since States are composed of men, and since the natural law binds all men, in whatever relation they may stand to each other. This is the law which Grotius and his followers call the internal law of nations, as it is obligatory upon nations in point of conscience. Others term it the natural law of nations. This law is immutable, as it consists in the application to States of the natural law, which is itself immutable because founded on the nature of things, and especially on the nature of man."

Three different schools.—The 17th and 18th centuries witnessed the birth of three different schools of writers mainly on account of the distinction between the natural Law of Nations, advocated by Grotius, and the customary or voluntary law of nations. They were the "Naturalists', the 'Positivists' and the 'Grotians'. These schools have been discussed in an earlier chapter<sup>2</sup> and need not detain us here.

Law of Nature in Modern Times.—Oppenheim aptly remarks that "the Law of Nature supplied the crutches with whose help history has taught mankind to walk out of the institutions of the Middle Ages into those of modern times. The modern Law of Nations in particular owes its very existence to the theory of the Law of Nature. Grotius took the decisive step of secularising the law of nature and emancipating it from purely theological ploetrine."

According to Sir Henry Maine, "The grandest function of the law of are was discharged in giving birth to modern International Law."

It must, however, be clearly understood that the Law of Nature although selding a great influence in the development of International Law cannot be sid to be altogether free from criticism. Grotius confused himself by lending the ideal notion of what ought to be with what it was. "If his view were correct", observes Lawrence, "there would always have been a general agreement as to the fundamental principles and more important precepts of the law of nature. But nothing of the kind has ever existed. Jurists and philosophers have differed hopelessly among themselves, while the great mass of man and have not even pretended to understand the matter." Again, as Brierly observes, medieval writers by declaring that natural law could overrule positive law in the case of a conflict introduced anarchical principle which

3. Oppenheim: International Law, Vol. I. 8th Ed., p. 93.

Wheaton: Elements of International Law, 1936 Ed., p. 12.
 Pages 35 & 36 ante.

was dangerous. They confused the function of legislation with that of discovering what existing law was when they opined that unreasonableness could invalidate a rule of law.

The Scotch jurist Lorimer was the last representative of the 'naturalistic' school. His conception that International Law was the law of nature realised in the relations of separate States and that there was, no positive International Law at all has hardly any adherent today. But as Garner observes: "Traces of the influence of the so-called law of nature are, however, not entirely lacking, and there are still a few who maintain that "while you may drive it out of the front door it will manage to gain fresh entrance through the back door or the windows." But ordinarily when jurists today invoke the law of nature they have in mind nothing more than the dictates of justice and right as they are founded on reason and the nature of things. As Oppenheim remarks, "the theory of the 'law of nature' as a system of jurisprudence has been 'shaken off' and the 'positivists' who not only defend the existence of a positive law of, nations embodied in custom and conventions but who regard it as by far the most important part, have gained the supremacy".

## CHAPTER V

# CODIFICATION OF THE LAW OF NATIONS

Definition.—A code is a consolidation of the statute law, or a statute collecting all the law relating to a particular subject. Codification is the process' of translating into statutes or conventions, customary law and the rules arising! from the decisions of tribunals, with little or no alteration of the law. It secures by means of general conventions, agreement among the States upon certain topics of International Law and acts as a check whereby the determination of a particular law is not left to the caprices of Judges. It also tends to reconcile conflicting views and renders agreement possible among different States.

Referent Meanings of Codification.—The term "codification of International Law" has been employed in three different senses, viz., (i) the harmonizing of municipal law of various countries by the preparation and enactment of uniform statutes; (ii) a systematic re-statement of exisiting customary International Law, i. e., ascertaining and declaring the existing rules of International Law; and (iii) developing, amending and improving the law as it is re-stated. The Committee on the Progressive Development of International Law and its Codification, set up by the U. N. General Assembly, resolved the controversy between the second and third meaning s of codification. Arte-15 of the Statute of the International Law Commission distinguishes between the 'progressive development of International Law' and its 'codification'. The late :r expression is used to denote the more precise formulation and systematization of rules of International Law in fields where there already has been extensive State practice, precedent and doctrine; while the former expression is used to mean the preparation of draft conventions on subjects which have not yet been regulated by International Law or in regard to which the law has not yet been sufficiently developed in the practice of States. The Committee recognized that the two terms were not mutually exclusive and it was the task of the Commission to provide both these purposes.

According to Professor Woolsey codification of International Law must entail two processes-(a) the scientific determination of the law, and (b) the achievement of the universal acceptance of the law so defined by means of a

<sup>1.</sup> J. W. Garner! International Law, p. 14.

incontrovertibly international aspect of the tragedy that forced flight of terrorised East Bengalis to India. It would be insulting human intelligence to call the repression by Pakistan as an internal affair. The problem was of international dimensions and a challenge to human conscience.

A more serious limitation on the range of International Law is that international economic relations fall within the sphere of domestic jurisdiction. Many matters like tariffs, bounties, trade, markets, etc., although falling outside the ambit of International Law yet prove to be the rivalries of modern States and provide the causes of their disputes.

It is a natural consequence of the absence of authoritative law declaring machinery, observes Brierly, that many of the principles of International Law and even more the detailed application of accepted principles are uncertain. But, continues he, on the whole the layman tends to exaggerate this defect. It is not in the nature of any law to provide mathematically certain solutions of problems which may be presented to it, for uncertainty cannot be eliminated from law so long as the possible conjunctions of facts remain infinitely various.

Apart from these defects, we as nations are still unprepared to embrace international Law on account of excessive nationalism, and the failure of international Law to play an effective role in the affairs of the States is due mainly to the fact that we are attempting to impose an international pattern of life on men and nations who are still provincially minded. The subjects of International Law, observes Schwarzenberger, are highly self-centred and not inclined to delegate to the international society functions which, however madequately, they themselves can discharge, and their ultimate reliance on their own power is not congenial to the growth of either a comprehensive or strong legal system. It is, therefore, certain that if International Law is to occome a pillar of a stable international order "States must place behind it a power that will enable it to make and maintain the most elementary of all legal distinctions, that between the legal and the illegal use of physical force."

New Trend in International Law.—A new International Law is fast developing. It has its roots in the regime of inter-dependence which has been growing since the middle of the nineteenth century. This phase has very appropriately been discussed by M. Alvarez in the dissenting opinion in Competence of the General Assembly for the Admission of a State to the United Nations. He observes:

"Formerly the rules of law were elaborated slowly, in accordance with well-established conventions or customs, or these rules were evolved, again as a slow process by jurists. Today, because of the social upheaval which we have just traversed, because of the remarkable dynamism in the life of peoples, because of new international organization and the institutions and organs which this organization has created, and finally because of the aspirations of peoples and the exigencies of modern life, the elaboration of such new rules is rapid and sometimes even sudden; this elaboration is effected by means which are different from those of former times and in this process the factors which have just been mentioned exert their influence.

"The common view that the International Law must be created solely by States is, therefore, not valid today—nor indeed has it ever been.

2. I. C. J. Reports, 1950, pp. 4, 34.

<sup>1.</sup> Brierly: The Law of Nations, 5th Ed. p. 76.

"In truth alongside of conventional law there is customary law, and above all the doctrines of jurists, who not only have the opportunity of establishing custom, but have formulated rules which have been respected by States.

"In future, it is to the General Assembly of the United Nations, to the International Court of Justice and to the jurists that we shall look, more than to any one, for the creation of the new International Law." The body of principles of International Law should have the approval of the United Nations—it should be a law which will not justify the vested interests of colonial powers and will take into account the problems of the present century, which is an age of thermonuclear weapons. The rules of law relating to the functioning and actual working of these international institutions have obtained a place in the rules of Public International Law.

The end of the Second World war further brought about emergence of new principles of International Law specifically dealing with certain classes of individuals who can be punished for violations of International Law. In the Nuremberg Trial individuals were regarded to have international duties which tra scend the national obligations of obedience imposed by the individual State.

#### Basis of International Law

Traditionally there are two rival theories which explain the basis of International Law, these being the theory of fundamental rights and the theory of consent.

Theory of Fundamental Rights.—The doctrine of 'fundamental rights', observes Brierly, is a corollary of the doctrine of 'state of nature', in which men are supposed to have lived before they formed themselves into political communities or States; for States, not having formed themselves into a super State, are still supposed by the adherents of this doctrine to be living in such a condition. Every State is supposed to be endowed with certain fundamental, or inherent or natural, rights, namely self-preservation, independence, equality, respect, and intercourse. Brierly assails this doctrine on the following grounds:—

- (1) The doctrine implies that men or States bring with them into society certain primordial rights not derived from their membership of society, but inherent in their personality as individuals and that out of these rights a system is formed; whereas the truth is that a legal right is a meaningless phrase unless we first assume the existence of a legal system from which it gets its validity.
- (2) It is misleading to apply the atomistic view of the nature of the social bond to States, for in the society of States the need is not for greater liberty for the individual States, but for a strengthening of the social bond between them.
- (3) Finally, the doctrine is really a denial of the possibility of development in international relations; when it asserts that such qualities as independence and equality are inherent in the very nature of States, it overlooks the fact that their attribution to States is merely a stage in an historical process.<sup>1</sup>
  - 1. Brierly, J L.: The Law of Nations, 5th Ed., pp. 50-52.

Consent Theory.-Oppenheim in consonance with the views of some other jurists is of opinion that the customary rules of International Law have grown up by common consent of the States-that is, the different States have acted in such a manner as to imply their tacit consent to these rules. He observes that new States which came into existence and were through express or tacit recognition admitted into the Family of Nations thereby consented to the body of rules for international conduct in force at the time of their admittance. This is known as the doctrine of positivism which lays down that nothing can be law to which States have not consented. The consent may be given expressly, as in treaty, or may be implied, as acquiescence of a State in a customary rule. The positivists regard International Law as consisting of those rules which the various States have accepted by a process of voluntary self-restriction, or as Jellinek terms it 'auto limitation'. Anzilotti and Triepel support the positivist theory. According to the former, customary rules are based on the implied consent of States; while, according to the latter, the obligatory force of International Law arises from an agreement of States to become bound by common consent.

The formality of a treaty is the best proof of the consent and acquiescence of parties, but it is not the only proof, nor does it exclude other proof; and more especially in transactions with Oriental States. Consent may be expressed in various ways; by constant usage, permitted and acquiesced in the the authorities of the State, active assent or silent acquiescence where there must be full knowledge.

The basis of International Law on the theory of a common consent of the States can be assailed on grounds more than one. In the first place, Fenwick observes that, taken in the sense of their individual consent, this theory "is simply inadequate to explain the assumptions upon which Governments appear to have acted from the beginning of International Law. Whatever the position taken by writers, governments have always looked upon International Law as having an objective character, as being binding because it was 'the law' not because States found it to their convenience to observe it. If governments have not undertaken to formulate any logical justification of the law, it has been because none seemed to be needed. Law was the alternative to anarchy; that was justification enough for it."

In the second place, the theory of a common consent rests on some sort of a fiction of implied consent. Implied consent is not a correct explanation of international customary law, for a customay rule is observed because it is believed to be binding and not because it has been consented to or received approval of the States. Kelsen observes that "the States are bound by general International Law without and even against their will. Thus, for instance, a new State, as soon as it comes into existence, has all the rights and all the duties stipulated by general International Law, without any act of recognition of general International Law, on the part of this State being necessary...Just as the individual does not submit voluntarily to the law of the State which is binding upon him without and even against his will, a State does not submit voluntarily to International Law, which is binding upon it whether it does recognize International Law or does not recognize it."

In the third place, the argument that a State admitted to the family of nations through express or tacit recognition implies a consent on the part of

<sup>161, 182.</sup> Papayani v. Russia: Steam Navigation and Trading Co. (1 63) 2 Moove N. S.

Fenwick: International Law, 1967 Ed., p 36.
 Hans Kelsen: Principles of International Law, p. 154.

the recognized State to submit to all the rules in force is fallacious for the simple reason that "the act of recognition is the act of the other States,-not the act of the State to be recognized.1 Recognition is dictated more on the ground of policy and political expediency than any other consideration, and consent on the part of the recognised State cannot be implied by a formal acknowledgment on the part of other States of its international personality.

In the fourth place, as Starke observes, "it is never necessary in practice when invoking a particular rule of International Law against a particular State to show that that State has assented to it diplomatically. The test applied is whether the rule is one generally recognised by the society of States." In the words of Smith "International Law as a whole is binding upon all civilised States irrespective of their individual consent. No State can by its own act release itself from the obligation either of the general law or of any wellestablished rule."

Finally, as Brierly observes, even if the theory did not involve a distortion of facts, it would fail as an explanation. For consent cannot of itself create an obligation; it can do so only within a system of law which declares that consent duly given, as in a treaty or a contract, shall be binding on the party consenting.

True Basis.—The true basis of International Law, as indicated above, is that a modern State cannot lead an isolated life in the present context of world affairs on account of enormous development in political ideas, art and literature and scientific discoveries. With the highly improved means of communications and establishment of permanent international institutions the whole world is knit together into a family of nations and any event occurring in any part of the globe has its repercussion on the rest of the world. "The result is", as Sir Cecil Hurst observes, "that a State cannot escape from subjection to International Law, or, to put it slightly differently, International Law is the necessary concomitant of statehood. International Law is in fact binding on States because they are States. This is not perhaps a very surprising position to which to attain, because it must be remembered that our modern conception of a State is itself the creation of International Law, and it is by the canons of International Law that the rights and duties of a State are defined."3

Fenwick is also of the same opinion when he observes that "the prevention of war, the regulation of conflicting claims, the promotion of the general welfare of the group are conditions which create a moral and material unity among the nations in the same manner that they create a moral and material unity between individuals within the State. The fact that nations have these common interests constitutes an actual community of States, and at the same time imperatively demands a rule of law; so that International Law may be said to be based upon the very necessity for its existence, upon the very human beings in constant contact with one another under the conditions of the present day".4

Brierly sharing the same opinion observes: "The ultimate explanation of the binding force of all law is that man whether he is a single individual or whether he is associated with other men in a State, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live".5

<sup>1.</sup> Sir Cecil Hurst : International Law : The Collected Papers, p. 11. 2. J. G. Starke An Introduction to International Law, 7th Ed. p. 28.
3. Sir Cecil Hurst: International Law, The Collected Papers, p. 9.
4. Fenwick: International Law, Third Ed., p. 31.

<sup>5.</sup> Brierly, J. L: The Law of Nations, Fifth Ed. p. 57.

### CHAPTER II

# SOURCES OF INTERNATIONAL LAW

According to Lawrence, if we take the source of a law to mean its beginning as law, clothed with all the authority required to give it binding force, then in regard to international affairs-there is but one source of law, and that is the consent of nations. This consent, may be either tacit or express. The first is shown by custom: that is to say, the habitual observance of certain rules of conduct by States in their mutual dealings though they have not solemnly bound thems lves in words to do so. It is expressed by long usage, practice and custom. Express consent is given by means of treaties, or international documents having the force of treaties.1

Oppenheim also shares the opinion of Lawrence with regard to the source of law, which is not to be understood to mean as 'cause' but relates to an historical fact out of which rules of conduct come into existence and impart legal force. He states that a State, just as an individual, may give its consent either directly by an express declaration or tacitly by conduct which it would not follow in case it did not consent.) The sources of International Law are therefore twofold, namely, (1) express consent which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) tacit consent, that is implied consent or consent by conduct, which is given through States having adopted the custom of submitting to certain rules of international conduct. Treaties and custom must, according to him, be regarded as the exclusive sources of the Law of Nations.2

Professor Brierly ascribes the main sources of International Law to custom and reason.

Article 38 (1) of the Statute of the International Court of Justice (established by the Charter of the United Nations) delines the sources of

- 1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting States. (They conform to interna-
- International custom, as evidence of a general practice accepted as law.
  - The general principles of law recognised by civilized nations.
- 4. Subject to the provisions of Article 593 judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Besides the above, the other sources of International Law which may be mentioned are International Comity, State papers other than treaties, State

1. Lawrence: The Principles of International Law, 7th Ed., p. 95

2. Oppenheim: International Law, Vol. 1, 8th Ed. p. 25.

3. The article provides that "the decision of the Court has no binding force except retween the parties and in respect of that particular case."

instructions for the guidance of their own officers and tribunals, resolutions of international conferences, municipal Acts of Parliaments and the decisions of municipal courts and opinions of juris-consults or text-book writers.

After having enumerated the main sources of International Law it will be proper to discuss each of them in some detail.

Law. There is no legislative organ in the field of International Law comparable to legislatures within the State, the enactments of which could bind all the States. The contracting parties may, however, establish an international organization by means of treaty with authority to bind them by its resolutions, or may even lay down rules for their mutual conduct. In this sense multilateral treaties are a feeble approach to international legislation.

Treaties may be divided into two groups, viz. (1) law making treaties which lay down general rules binding on the States or enunciate new general rules for the guidance of States in future or for their future international conduct, and (2) treaty contracts which deal with a special matter between the contracting States only. A law making treaty is a multilateral arrangement, or traitelai, having the effect of establishing certain legal norms for the conduct of States in their mutual intercourse. Only the law making treaties form the source of International Law and not ordinary bilateral treaties which bind only two or more States for some special object, or which are of special interest to the participating powers. "The law-making treaty involves two distinct operations: (a) a legislative operation whereby rules are laid down; and (b) the undertakings of the contracting parties to conform to the rules." The examples of law making treaties are:

- (a) Various peace treaties, e. g., of Westphalia (1648), Paris (1815) and Versailles (1919) creating constitutional charters; and
- (b) Declaration of Paris (1856), the Geneva Conventions of 1864, 1906, 1929 and 1949, the Suez Canal Convention (1888), the two Hague Conventions of 1899 and 1907, the Covenant of the League of Nations (1920), the Barcelona Conventions regarding Navigable Waterways and Freedom of Transit (1921), the Kellogg-Briand Pact or Paris Peace Pact, 1928—a general treaty for the renunciation of war, the Montreux Convention regarding the Straits (1936) and the Charter of the United Nations (1945)—which are pure law-making treaties.

Oppenheim states that since the Family of Nations is not at present a State like community, there is no central authority which can make law for it in the way that Parliaments make law by statutes within the States. The only way in which International Law can be made by a deliberate act, in contradistinction to custom is by the members of the Family of Nations concluding treaties in which certain rules for their future conduct are stipulated.<sup>2</sup>

There is no doubt about the fact that treaty stipulations override rules of international customary law which are incompatible with them. This proposition received approbation in the case of S. S. Wimbledon<sup>3</sup> (1923) where

J.G. Starlee: 114 Istroductions international law,

J. G. Starke: An Introduction to International Law, 3rd Ed. p. 40.
 Oppenheim: International Law, Vol 1, 8th Ed., p. 28.
 (1923) P. C. I. J. Ser. A. No. 1.

the Permanent Court of International Justice held that treaty law takes priority over international customary law.

It must, however, be borne in mind that even a law-making treaty is subject to the limitation applicable to ordinary treaties, that it will not bind States which are not parties to it. "Thus," observes Brierly, except in the almost impossible event of every State in the world becoming a party to one of these treaties, the law which it creates will not be law for every State." He regards the terminology 'general' International Law created by such treaties as unhappy. Oppenheim observes that universal International Law is created when all or practically all members of the Family of Nations are parties to these treaties, e. g., the General Treaty for the Renunciation of War of August 27, 1928.

Custom .- It is the older and original source of law, although, comparatively speaking, it has lost its priority to international treaties since the middle of the last century. / It is as such the second important source of International Law to the extent to which it is evidence of a general practice accepted as law. Even in the interpretation of treaties reference is frequently made to customs in case of doubt. Customs are the rules evolved after a long historical process which ultimately find place in their recognition by international community. Custom in its legal sense involves something more than habit or usage-"a usage left by those who follow it to be an obligatory one." Custom is that line of conduct which the society has consented to regard as obligatory," The extra-territorial rights and privileges afforded to foreign diplomats by all civilized States in their territory furnish an example of the force of custom as a basis for International Law.

Custom and Usage.—The terms "custom" and "usage" are often used interchangeably. According to Starke, there is a clear technical distinction between the two. Usage represents the twilight stage of custom. Custom begins where usage ends. Usage is an international habit of action that has not yet received full legal attestation. Usages may be conflicting, custom must be unified and self-consistent.2 A custom, in the intendment of law, is such a usage as hath obtained the force of a law. (Viner's Abridgement. Oppenheim also distinguishes between custom and usage in the same terms. Says he: "International jurists speak of a custom when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to International Law, obligatory or right. On the other hand, they spear of a usage when a habit of doing certain actions has grown up without there being the conviction that these actions are, according to International Law, obligatory or right."3 / Thus the term 'custom' is in the language of international jurisprudence a narrower conception that the term 'usage' as a given course of conduct may be usual without being customary.

In the Columbian Peruvian Aylum Case4 the International Court of Justice observed that the party relying on custom must prove that the custom was established in such a manner that it had become binding on the other party, that the rule invoked was in accordance with a constant and uniform usage

<sup>1.</sup> John Westlake: International Law, Vol. 1, p. 14.
2. Starke: Introduction to International Law, Vol. 1, p. 14.

Starke: Introduction to International Law, 3rd Ed., p. 33.

Oppenheim: International Law, Vol. 1. p. 26 4. I. C J. Reports, 1950, 276.

practised by the State in question, and that this usage was the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.

When usage crystallises into custom.-Pitt Cobbett observes that "as between nations some particular practice or course of conduct arises, attributable in the first instance to some particular emergency or prompted by a common belief in its convenience or safety. But its observance is discretionary; and it exists side by side with other competing practices. Next, as between competing usages the fittest, having regard to the needs of the time, generally tends to prevail. It gathers strength by observance. It comes to be recorded, and is appealed to in cases of dispute, although not infrequently violated. Finally, it comes to command a general assent; and at this stage it may be said to take on the character of a custom, which involves not merely a habit of action, but a rule of conduct resting on general approval." He further observes: "The test usually adopted in order to ascertain whether usage has developed into obligatory custom is, that it must be approved by the common consent of civilised nations or the general consensus of opinion within the limits of European civilisation. The difficulty, of course, lies in the application of this test. Something will turn on the question of the long continuance of the usage, but even more will turn on the number of States adopting it; in fact, unanimous opinion of recent growth will contsitute a better foundation than the long practice of particular States."1

The predominance of custom in International Law is due to loose character of international society. There is no strong central authority to regulate the relations of States. There is no effective law-making machinery like Parliaments in the States. In the absence of legislation, custom, moving slowly but surely, tends to assume obligatory character owing to its approval by the common consent of civilized nations.

International customary law of to-day is, according to Schwarzenberger, very often only international treaty law of past ages which, in view of the general acceptance of the principles underlying such clauses, the parties to modern treaties frequently consider no longer as being in need of express incorporation. "Thus, numerous standards of international conduct which were devel ped over centuries in a multitude of international treaties, have slowly sunk back into the body of international customary law."2

Both national and international courts play an important role in the application of custom. Whenever the claim of a party is based on a customary rule, the Court has to investigate whether or not the rule invoked by the party is a valid rule of international custom and for the purpose of such inquiry it sees assistance from the work of great publicists, diplomatic notes and other State papers evidencing practice of the State, and the growing body of decisions of municipal and international tribunals. The existence of a custom requires to be proved, and it is always a matter of evidence to be inferred by the occurrence of certain objective actions whether a particular usage has or has not been agreed to. In order to establish an international custom there must be the repetition, continuity and generality of series of analogous acts.

Pitt Cobbett: Cases on International law, 5th Ed., Vol. 1, pp. 5 & 10.
 Schwarzenberger: A Manual of International Law, p. 13.

It was observed in Reg v. Keym<sup>1</sup>: "Whether a particular usage has or has not been agreed to must be a matter of evidence. Treaties and acts of State are but evidence, and do not, in this country at least per se, bind the tribunals. Neither, certainly, does a consensus of jurists; but it is evidence of the agreement of nations."

It was observed by a German Court in Lubeck v. Mecklenburg-Schwerin that a single act of a State agency or authority could not create any rights of custom in favour of another State; such conduct in order to create customary law must be regular and repeated.

There is a growing trend of thought that custom has only a declaratory and not a constitutive character. There is a great deal of force in this view, which is reinforced by the provision of Article 38 of the Statute of the International Court of Justice, which enumerates as a source of International Law, "international custom, as evidence of general practice accepted as law."

In order that an international custom be binding on a State, it is not necessary that it must be a party to the development of such custom. When a State becomes a member of the international community on its recognition, it automatically subjects itself to customary law of nations. "If, however, a State should, during the time in which a certain custom in International Law is being formed, claim for itself the right not to adhere to the custom thus developed, but should, on the contrary, engage in a different practice, such a State could not be forced to comply with the customary law established by the other States. This principle may be illustrated by the fact that, though a large number of States have accepted the customary 'marine league' as the measure of their territorial waters, other States have protested this custom over a long period of time and have maintained a greater distance for the measure of the so-called maritime belt. The States which refuse to agree to the '3-mile limit' cannot be forced to comply on the ground that this distance, which was the range of eighteenth-century cannon, is a custom which rests on a better foundation than the claim of a '4-mile limit' or some other on a better

Court of Justice authorises the Court to apply the general principles of law recognized by civilized nations in addition to international conventions and custom, which are the two main sources of International Law. This auxiliary it is difficult to refer to treaties or produce evidence that a principle of law forms part of international customary law, on the principles of justice and equity, way of analogy and its evolution. As Sir Hersch Lauterpacht has pointed out, general principles of law may be a necessary and inevitable way of filling a principles of law recognized by chilized nations" also embraces the principles of private law administered in national courts and as applicable to international relations. This source of law is gaining immensely in importance.

The incorporation of this clause in the Statute of the Court discards the positivist view which regards treatics and custom as the only sources of International Law upon which international courts can base their decision. It also militates against the view that International Law lacks the requisite

<sup>1. 2</sup> Ex. Div. 63. 2. Oscar Svardien : An Introduction to the Law of Nations, p. 66.

elasticity to determine international disputes according to the fundamental legal principles. Professor Gutteridge is of the view that the object of the invocation of the 'general principles' is with a view to providing the judge, on the one hand, with a guide to the exercise of his 'choice of a new principle' and, on the other hand, to prevent him from 'blindly following the teaching' of the jurists with which he is most familiar without first carefully weighing the merits and considering whether a principle of private law does in fact satisfy the demands of justice.

It was observed by Sir Robert Phillimore in Reg v. Keyn1 that "the law of nations is said to be founded upon justice, equity, convenience and the reason of the thing, and confirmed by long usage."

The Special Arbitral Tribunal between Germany and Portugal also applied the general principles of law in the Mazina and Naulilaa Cases where the arbitrators observed that in the absence of rules of International Law applicable to the facts in dispute, they were of opinion that it was their duty to fill the gap by applying principles of equity fully taking into account the spirit of International Law, which is applied by way of analogy and its evolution.

Story, J., while examining the history of slavery in U. S. v. The Schooner La Teune Uagenie3 observed that the law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals...

The Permanent Court of International Justice in consonance with the general principles of law applied the rule of res judicata in the Chorzow Factory (1927) and that of estoppel in the case of Diversion of Water from the Meuse's (1937).

4. Judicial Decisions: Tribunals and Prize Courts: - Article 38 of the Statute refers to judicial decisions as a subsidiary means for the determination of rules of law, and those words correctly state their function. They are often relied upon in argument and decision as affording evidence of international custom and have contributed indirectly to the development of International Law. Greater weight is attached to the judgments of mixed tribunals appointed by the joint consent of the two contending States than to Admiralty Courts appointed by one State alone.

Article 59 of the Statute of the International Court of Justice expressly provides that the decision of the Court has no binding force except between the parties and in respect of that particular case. In view, however, of the wide representation of the world's main legal systems first on the Permanent Court of International Justice and then on the International Court of Justice and of the high reputation and impartiality of the Judges of the Courts, their decisions have frequently been referred to as manifestation of the intrinsic merits of judicial precedent. Further even Article 59 of the Statute has not prevented the two World Courts from frequently citing their decisions and advisory opinions as precedents. There is a strong tendency towards continiuty in the interpretation and application of the law.

<sup>1. 2</sup> Ex. Div. 63.

<sup>2. 8</sup> M. A. T. (1929), p. 409. 3. 2 Mason 409. 4. A 9, p. 31. 5. A/B 70, p. 25.

"The decision of an international court is not itself a rule of International Law but is direct evidence of the existence of a rule of International Law. Frequently, it is no more. At times, however, a realistic examination of the decision reveals that the Court, although ostensibly finding and applying existing law, extended the metes and bounds of existing International Law with the result that the decision, regarded as an international judicial procedure, may not inaccurately be termed a source of International Law."1

"Judicial decisions and arbitral awards," observes Svarlien, "though important as sources of the law of nations, should not be overestimated as such. In the Anglo-Saxon world a great deal of deference is shown to judicial opinions, some of which contain obiter dicta, and decisions are very often given a more extended application than they deserve."2

Some writers refuse to attach the same importance to decisions of arbitral tribunals as they attach to judicial decisions on account of the fact that arbitrators act as negotiators rather than as judges on questions of fact and law. Further their jurisdiction is generally limited by the terms of the agreement of the parties. But the arbitrators as a rule act according to judicial principles and the awards on the Alabama Claims and Behring Sea Fisheries clearly support this view. Moreover, where the tribunals are authorised to decide this dispute exacque et bono (in equity and good conscience or fairness) they clearly lay down the lay which has a very high persuasive value.

Decisions of Municipal Courts .- As a source of law the decisions of municipal courts are not accorded the same sanctity as is attached to those of international courts and tribunals and they have seldom been cited by the two World Courts. Such courts will normally not apply International Law which runs counter to the explicit provisions of the written constitution. It is the practice of the British courts not to apply automatically treaties concluded between the Crown and foreign States unless recognized by Parliament, if they involve any modification of the common or statute law. The executive has a considerable influence in several countries where courts are confronted with questions affecting matters of policy. Schwarzenberger observes that it is true to say that only on the lowest level are judgments of municipal courts merely evidence of national attitudes to International Law.

It was observed in the case of Thirty Hogsheads v. Boyle3 by Marshall, C. J., that "the decisions of the courts of every country so far as they are founded upon a law common to every country, will be received, not as authority, but with respect."

Schwarzenberger observes that even in countries which unquestionably accept the independence of the judiciary from the executive, and treat accepted principles of International Law as part of the law of the land, municipal courts are faced with serious handicaps as compared with international courts and tribunals. He thus sums up the handicaps : "In the first place, they normally may not apply international law which runs counter to the constitution-if there is a written constitution-or even to ordinary statute law. Secondly, British courts, for instance, may not automatically apply treaties concluded between the Crown and foreign States if such treaties would modify the

3. 9 Cranch 191, 198

<sup>1.</sup> H. W. Briggs . The Law of Nations, 2nd Ed., p. 45. 2. Oscar Svarlien : An Intoduction to the Law of Nations, p. 67; Amos S. Hershey : The Essentials of International Public Law and Organization, pp. 26-27.

Common Law or otherwise affect the rights of individuals. Thirdly, in many countries, the doctrine of act of State imposes restrictions on the judicial freedom of municipal courts. Fourthly, national courts have a tendency to accept the word of the executive as the best possible evidence and, therefore, as final, in matters that are considered primarily matters of policy, such as whether a state of peace or war exists between certain countries, or whether a foreign State or government has been recognized by their own country. Fifthly, in systems of municipal lav in which the principle of stare decisis applies, municipal courts are inclined to follow previous decisions covering the matter as determining what a particular rule of international law is."

Prize Courts.—With regard to Prize Courts, which are tribunals set up by belligerent States for the purpose of deciding upon the validity of the captures made by their cruisers, they administer International Law and give effect to it as the law not laid down by any particular State but which originates in the practice and usage long observed by civilised nations in their relations towards each other, or in express international agreements. They are no doubt bound by Acts of Parliament, but if they are inconsistent with the Law of Nations, the Prize Courts in giving effect to such provisions would no longer be administering International Law. They would in the field covered by such provisions be deprived of their proper functions as a Prize Court. Lawrence observes that such interference by states are fortunately rare; and accordingly it happens that the decisions of Prize Courts are respected in proportion to the reputation for learning, ability and impartiality enjoyed by their judges. The English and American Law Reports bear eloquent testimony to the highly valuable judgments delivered by eminent Judges like Lord Stowell, Dr. Lushington, Kent and Story.

In the leading case of the Maria<sup>3</sup> Sir William Scott observed: "It was the duty of the English Prize Court not to deliver occasional and shifting opinions to serve present purposes of national interest, but to administer with indifference that justice which the law of nations holds out, without distinction, to independent State, some happening to be neutral, and some belligerent."

Again, in the case of the Recovery it was observed: "It is to be recollected that this is a court of the law of nations, though sitting here under the authority of the King of Great Britain. It belongs to the other nations as well as to our own; and what foreigners have a right to demand from it is the administration of the law of nations simply......"

of the Statute of the International Court of Justice authorises the Court to apply the teachings of the most highly qualified publicists of the various nations as a subsidiary means for the determination of rules of law. In the first place, the work of writers plays "a part in proportion to its intrinsic scientific value, its impartiality and its determination to scrutinise critically the practice of States by reference to legal principle." In the second place, writings of authors are not an independent source of law, though they may lead in course of time to form International Law by providing useful evidence of what the law is.

Georg Schwarzenberger: A Manual of International Law, 2nd Ed., p. 17.
 Lawrence: The Principles of International Law, p. 108.
 (1799) I.C. Rob. 340.

<sup>4. (1807) 6</sup> C. Rob. 341, 349.

<sup>5.</sup> Oppenehim: International Law, Vol 1, 8th Ed., p. 33.

foreigners equality before the law, the Jews did not contribute much to raise the international relations of their time.

Greeks.—The Greeks were more civilised than their neighbours whom they regarded as barbarians. Their notion of superiority prevented them from developing mutual relations with their neighbouring nations. The Greeks lived in numerous small city States which were independent of one another. The inhabitants of these States belonged to the same race, blood and religion. This close affinity in course of time united these independent fragments into a community of states which observed certain rules inter se in times of war and peace. They frequently resorted to arbitration for settlement of their disputes; treated heralds and priests who carried the holy fire as inviolable; commenced no war without a previous declaration, gave burial to warriors dying in the battle-field; exchanged prisoners of war or let them off on payment of ransom; regarded the temple of the god Apollo as permanently inviolable; and gave special privileges to ambassadors who were ceremoniously received and their persons treated as inviolable.

The Greeks developed theories concerning the proper conduct of war. Their expositions of these theories and the surviving records of Greek practice in war furnished authority to the early writers on International Law for propounding their rules.

Oppenheim observes that the Greeks left to history the example that independent sovereign States can live in a community which provides a law for the international relations of the member States provided that there exist some common interests and aims which bind these States together. It has, however, not to be forgotten that the Greeks never made the same distinction between law, religion and morality which the modern world makes. But the fact remains that the Greek States set an example to the future that independent States can live in a community in which their international relations are governed by certain rules and customs based on the common consent of the members of that community.

Romans.—The Romans had an advanced notion of International Law. "Even though the present system of International Law is generally regarded as having had its origin with the rise of the modern State in the sixteenth and seventeenth centuries, its earliest foundations are to be found in the ancient world. In this respect, the influence of Roman Law is of special significance. It is a tribute to the legal genius of Rome that the primitive law of the city-State was capable of such expansion and refinement as the great world empire should in time require."

The Romans had a set of 20 priests, termed fetiales, who managed relations with foreign States by the laws called jus fetiales or jus sacrale. The Romans had one set of laws which were applicable exclusively to themselves, viz., jus civile, the law applicable to Romans, and another set for foreigners, viz., jus gentium, the law which they had in common with other nations. The original jus civile was an archaic system of law and provided no legal remedies in cases involving foreigners. New and liberal rules were subsequently evolved by praetor pregrinus, a special magistrate. Later this new branch of the law came to be applied equally to Roman citizens.

The jus gentium—a Latin term from which the phrase law of nations has been derived—was later on strengthened by the development of jus naturale, which was the law that was constituted by right reason, common to nature and to man. It was ultimately this law or jus fetiales that governed the relations

<sup>1.</sup> Oscar Svarlien - An introduction to the Law of Nation s. p. 67.



of Romans with foreign countries in times of peace and war, and also when they entered into treaties of friendship with them.

With the introduction of the general principles of law and justice having a universal application in jus gentium, it later on identified itself with jus naturale and the two terms became synonymous in Roman law.

Roman law recognized four just reasons for war, viz., (a) violation of the Roman dominions, (b) violation of ambassadorial privileges, (c) violation of treaties and (d) support given during war to an opponent by a hithero friendly State. War could be ended according to Romans (i) through a treaty of peace, (ii) by surrender (deaitio) or (iii) through conquest of the enemy's country (occupatio).

Treaties were divided into three kinds, viz., (i) Treaty of friendship (amicitia), (ii) Treaty of alliance (foedus), and (iii) Treaty of hospitality (hospitium). The Romans had great respect for treaties, which could be terminated by notice.

From the above brief survey of the set of rules followed by Romans, it appears that they followed legal rules—which were essentially municipal—for their foreign relations. Oppenheim observes that though this legal treatment can in no way be compared to modern International Law, yet it constitutes a contribution to the law of nations of the future in so far as its example furnished many arguments to those to whose efforts we owe the very existence of our modern law of nations. And, while we subsequently study the contribution of Hugo Grotius, it will be apparent that the theory of jus naturale, as developed by Romans, was the most powerful influence that led to the development of International Law.

# Division of the History of International

First Period.—Broadly speaking, Lawrence divides the History of International Law into three periods. The first period extends from the earliest times to the establishment of the dominion of Rome under the Caesars. Its distinguishing mark is the belief that nations owed duties to one another if they were of the same race, but not otherwise. The fundamentals of International Law, viz., unity by bonds existed among Greeks, inasmuch as all Hellenic peoples of the same race and religion were united together by bonds which did not subsist between them and the rest of the world. This period is marked by the development of a maritime code of the Rhodians, which code of Middle Ages, viz., the Consolato del Marc, is founded. Piracy and robbery were not regarded as dishonourable professions during that time. There existed almost no distinction between a state of war and a state of peace, although the persons of heralds were respected.

The Romans of the Republic, however, had no such trace of International Law as existed in the Hellenic communities for they did not bind themselves by any idea of mutual obligations, nor did they belong to a group of kindred States. The Roman jurists did not evolve any law which could regulate international relations or give to other States the benefit of any idea of mutual obligation except with regard to faith in treaties and the safety of the persons of ambassadors.

Second Period —The second period dates from the establishment of the dominion of Rome under the Caesars to the Reformation. Lawrence points out that this period is characterised by the conception that there was to be found somewhere a common superior who regulated the dealings of ordinary

political communities with each other. The Roman Empire extended over the settled part of Europe and much of Asia and Africa. Caesar was the political superior of a large number of subordinate rulers whose disputes were settled by appeals to him. He imposed perfect obligations upon people of the Empire, who believed in the existence of a common superior over all States as part of the natural order of the universe. International Law was really based on the commands of a superior in the Austinian sense of the term.

The Roman Law guaranteed protection to goods and persons of a foreign State when there was a treaty of friendship between Rome and that foreign State, but the goods could be captured and persons enslaved if there existed

no treaty of friendship.

Fifteenth and Sixteenth Centuries.—The Roman empire embraced nearly the whole civilised ancient world and the personal character of each emperor determined the nature of his influence on the empire. The Emperor and the Pope claimed universal authority as the temporal and spiritual heads. There was consequently no need for a law of nations during the middle ages till we find that a multitude of independent States had come into being and the rivalry between Pope and the Emperor had cropped up as to the extent of their respective authority. This process started from the treaty of Verdun of 843 and reached its climax with the reign of Frederic III, Emperor of Germans from 1440 to 1493.

The diminution of the Roman Empire and the rising feeling of nationalism greatly diminished the notion of a common superior governing the relations of States inter se. The common supremacy finally ended with the storm of the Reformation. Protestant jurists challenged the imperial authority while the Protestant princes of the German empire fought against the Emperor.

The disintegration of the Christian Commonwealth of Europe stimulated the growth of the principles of a future International Law. The factors largely paving the way for such a growth, according to Oppenheim, were these : (a) the influence of the Civilians and Canonists who treated from a moral and ecclesiastical point of view many questions of the future International Law concerning war; (b) the collections of the various codes of maritime law, e.g., the Laws of Oleron (12th century) comprising decisions of the maritime court of Oleron in France; the Consolato del Mare (middle of 14th century), a private collection made at Barcelona in Spain regulating the commerce of the Mediterranean; (c) the numerous leagues of trading towns for the protection of their trade and trading citizens, e.g., Hanseatic formed in the 13th century stipulating arbitration between their member-towns in the case of dispute; (d) the growing custom on the part of the States of sending and receiving permanent legation which became a rule from the end of the 15th century necessitating growth of international rules concerning their inviolability; (e) the custom of the great States of keeping standing armies giving rise to universal rules and practices of warfare; (f) various schemes, though utopian, for the establishment of eternal peace which arose from the 14th century; and (g) the Renaissance of science and art in the fifteenth century and the Reformation putting an end to the spiritual mastership of the Pope over the civilized world.

Another factor that contributed to the development of modern International Law, according to Schwarzenberger, was that under the impact of political, spiritual, economic and technical revolutions, by which the medieval

<sup>1.</sup> Oppenheim: International Law, Vol. 1, 8th Ed., pp. 79-32.

<sup>2.</sup> Georg Schwarzenberger; A Manual of International Law, (2nd Ed.), p 5.

community was transformed into the modern capitalist world, strong incentives were created towards greater centralisation and expansion of the

or i ginal European inter-State system.

Third period.—We then come to the third period extending from the Reformation to the present time. Lawrence points out that here we obtain a true International Law, based on the principle that States are separate and independent members in a great society controlled by no common superior, yet nevertheless not lawless, but governed by rules of conduct binding on all its members.

Seventeenth and Eighteenth Centuries —International Law in its modern sense may, however, be regarded to begin from Grotius (1583-1645), who published his work De Jure Belli ac Pacis, in Paris, in 1625.

Before studying the great contribution made by him, it will be desirable to refer to the writings of early writers on International Law which also helped considerably in laying the foundation of International Law. The fore-runners of Grotius were: (1) Balthazar Ayala, (2) Albericus Gentilis, and (3) Francisco Suarez.

Balthazar Ayala.—He was Judge Advocate-General of the Prince of Parma's army in the Netherlands. He published in 1582 at Douai his book, De Jure et Officis Bellicis, attacking the common notion that war knows no law. He advocated the doctrine of jus naturale, and pleaded for jus gentium established by common consent.

Albericus Gentilis. (1552-1608).—He was a doctor of civil law. He was an Italian Protestant and had to flee from his native land, to escape religious persecution. He came to England wher: he was appointed Professor of Civil Law at Oxford in 1587. He published his great work, De Jure Belli Libri Tres, in 1598, advocating that there was a law of war based on natural reason. He discussed the nature of war and its effects on person and property. He separated International Law from ethics and theology and treated it as a branch of jurisprudence. Although Grotius criticised Gentilis for his omissions, style and arrangement he drew largely from the latter in his great work.

Francisco Suarez. (1548-1617).—He was a Spanish writer on the law of nations. He published in 1612 his book Tractatus de Legibus et Deo Legislatore, wherein he laid emphasis on the moral unity of mankind. He conceived of a universal society of States and observed that these States when standing alone were never so self-sufficient that they did not require some mutual assistance, association and intercourse. He conceived of a community of nations and urged upon the existence of a law which all nations ought to obey. He observed that the relationship between the law of nature and jus gentium was very intimate. As regards treatics, he classified them in the area of jus gentium so far as their form and procedure were concerned; but their observance after they had been entered into was a matter of good faith, a principle of natural law.

Grotius.—Huig van Groot, popularly known as Hugo Grotius, was born at Delft in Holland on April 10, 1583. He soon acquired fame as an author, jurist and poet. He was a genius from his childhood and received the degree of Doctor of Laws from the university of Orleans at the age of 15. He was called to the bar in 1599 when he was only 16 years old. He, however, soon plunged himself in politics. He took part in civil disputes which led to his arrest in 1618 and condemnation to perpetual imprisonment. He escaped from prison in 1621 with the aid of his wife in a box intended to contain the books he had borrowed from his friends. As already stated, his most important work De jure Belli ac Pacis (the Law of Peace and War), was published in three

volumes in Paris in 1625. He distinguished between the jus gentium, the customary law of nations, and the jus naturale, the law concerning the international relations of the States, and dealt exhaustively with the rules of the natural law of nations. He said that rights common to all could not be conferred by statutes and ordinances of a particular State but they were derived from natural law—the dictate of right reason. According to him the natural society knew only God as his superior—only the divine law was writ large in the heart of man. He concluded that nations living together in this state of mutual interdependence were guided by the same law. He based the positive Law of Nations on the voluntary consent of nations to observe a certain code of rules in their mutual dealings.

He abhorred wars by stating in the pereface to his great work that he saw prevailing throughout the Christian world a license in making war of which even barbarous races should be ashamed. He observed that men rushed to arms for slight causes, and that when arms had once been taken up there was no longer any respect for law, divine or human; it was as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.

Grotius was impelled to give expression to the above candid views on account of the great carnage resulting from the Thirty Years' War in which the powers of Europe were engaged.

He regarded sovereignty as territorial. His keynote to success lay in his judicious use of already approved materials and theories.

His treatise soon achieved an international reputation, and its leading principles largely guided the deliberations of the European Congress which brought about the Peace of Westphalia (1658) marking the end of the Thirty Years' War. Before the end of the seventeenth century his treatise was considered as embodying the rules of International Law, and he richly deserves the title of "Father of the Law of Nations".

By the end of the 17th century De Jure Belli ac\_ Pacis had been translated into all the languages of the world.

We revert to Grotius again a little later while dealing with the Law of Nature in a subsequent chapter.

Zouche.—Richard Zouche (1590-1660) also contributed in no small measure to the growth of International Law. He was professor of civil law at Oxford and Judge of the Admiralty Court. He published his great book, Juris et Judicii fecialis, sive Juris inter Gentes, in 1650, which has been described as the first manual of the positive law of nations. He differed from Grotius, inasas he emphasized the customary law of nations and precedents, established in the intercourse of States, although not denying the existence of natural law of nations.

Zouche is classed with Gentilis as ore of the founders of the positivist school. He made a clear division between the law of war and the law of peace and gave the latter more prominence.

Three Schools.—The seventeenth and eighteenth centuries gave birth to three different schools of writers on the law of nations, viz., the Naturalists, the Positivists and the Grotians. The naturalists are also known as the "pure law of nature school", the positivists as the "historical school" and the Grotians as "electics".

The Naturalists denied that there was any positive law of nations based on custom or treaties, but maintained that it was only a part of the law of nature. Samuel Pufendorf (1632-1694) led this school. He maintained that

States were bound to regulate their conduct towards one another by the law of nature as they had no common superior. He observed that the law of nations was wholly a part of the law of nature and denied customs and treaties as the sources of International Law. He could justify resort to war when all means to a peaceful settlement had been exhausted, and advocated that there should be no laws of war, as any mercy shown in the prosecution of the war, would only retard the early return of the natural state of peace. In this view, Professor Brierly observes that he advocated "a natural law in a new and debased form of a law supposed to be binding upon men in an imaginary state of nature."

The German philosopher Christian Thomasius (1655-1728) was a great follower of I ufendorff. He distinguished between natural and positive law and the science of law and morals. His other followers were the English philosophers Francis Hutcheson and Thomas Rutherford, the French philosopher Jean Barbeyrac (1674-1744), the Genevan philosopher Jean Jacques Burlamaqui and

the French diplomatist De Rayneval.

The Positivists differ fundamentally from the naturalists and ascribe the growth of International Law to custom and international treaties. They regard the practice of the States in their mutual relations as the true source of International Law. They do not consider natural law as of any importance but regard customary law based on treaties and customs to be positive International Law and of highest importance. They gained prominence in the eighteenth century. The Dutch jurist Bynkershoek (1673-1743), the German writer John Jacob Moser (1701-1785) and George Friedrich de Martens (1756-1821) were the leading exponents of this school. This school represents the modern view of International Law.

Byn kershoek evolved the principle that the marine league was the measure of territorial waters of States. He observed that the sea should belong to the State it borders as far as a cannon shot will reach from the shore, and it appeared that the range of cannon was about three miles in the eighteenth century. He regarded custom and treaties as the basis of International Law, and pointed out that with the change of customs the law of nations also changed.

Moser also attributed custom and treaties as the sources of International Law.

Martens also made a valuable contribution to the positive law of nations and referred to natural law to fill up gaps or lapses into the positive law of nations.

The Grotians occupied a position midway between the Naturalists and Positivists. They maintained the distinction between natural and voluntary law of nations as propounded by Grotius and kept both as the bases of the law, but unlike Grotius they considered the positive or voluntary law of nations as important as the natural law of nations. They gained enormous influence during the seventeenth and eighteenth centuries. Two important exponents of this school were Christian Wolff (1679-1754) and Emerich de Vattel (1714-1767).

Wolff was a German philosopher and envisaged in the international community a civitas maxima or a superstate standing above the component member States.

Vattel was a Swiss jurist, who published in 1758 his great work Le droit des gens, maintaining that the law of nations was the law of nature applied to nations. He made two divisions of law, voluntary and the necessary law. Both of them were found in International Law. The voluntary part of International Law consisted of custom and treaties, while the necessary part constituted natural law. He did not agree with the fiction of civitas maxima as a found-

ation for International Law, as propounded by Wolff, but advocated the doctrine of the state of nature. He enunciated the doctrine of the equality of States and observed that strength and weakness produced in this regard no distinction. "A dwarf is as much a man as a giant is; a small republic is no less a sovereign State than the most powerful kingdom." Vattel's influence on the development of International Law is second only to that of Grotius. The French Professor De Lapradelle writing about the work of Vattel observes: "Grotius had written the International Law of absolutism, Vattel has written the International Law of political liberty."

Nineteenth and Twentieth Centuries .- The development of International Law during the nineteenth and twentieth centuries is attributable to several factors. First, there was an endeavour on the part of nations after the Congress of Vienna (1815) to abide by the rules of the law of nations. That Congress was the first European international assembly which made rules for navigation in international rivers and prescribed ranks and precedence of envoys. Secondly, this period is marked by the conclusion of several law-making treaties, e. g., the Declaration of Paris (1856) embodying the rules for the guidance of States when engaged in warfare at sea, the Geneva Convention (1861) for the amelioration of the condition of the sick and wounded in warfare on land, the Declaration of St. Petersburg (1868) prohibiting the use of explosive bullets in war, the Geneva Convention of 1906 extending the provisions as to sick and wounded in land warfare to maritime warfare, etc. And, lastly, greater emphasis was put on the positive theory of International Law by writers, such as De Martens, Manning (Commentaries on the Law of Nations, 1839), Phillimore (Commentaries on International Law, 1854), Maine and Westlake. Other authors like Hall, Walker (Science of International Law, 1893), Westlake, Oppenheim, Lawrence and Hyde, also helped largely to the development of International Law by their contributions as declaratory authors.

In the United States, several writers contributed to the development of International Law by their writings, e. g., James Kent (Commentaries on American Law, 1826) and Wheaton (Elements of International Law, 1836). Lieber codified the laws of war and the rules with regard to the rights and duties of neutral States.

The continental writers also exercised a great influence on the development of the science of International Law. The names of Klubers, Heffter, Bluntschli, Jellinek, Ihering, Triepel and Kaufmann rank high as continental jurists.

It became apparent that the Society of Nations became coextensive with civilization by crossing the bounds of Christendom and the rules of International Law developed on consent of the nations.

The Hague Conferences of 1899 and 1907—the work of great international assemblies for the pacific settlement of international disputes—tried to evolve laws for the family of nations as a whole. The First Hague Conference of 1899 evolved a code for land warfare. The Second Hague Conference of 1907 adopted conventions dealing with bombardment—the prohibition to bombard undefended habitations—the laying of contact mines, rights and duties of neutrals in naval warfare, conversion of merchant ships into warships, maritime warfare, military hospital ships, flags of truce, etc. The Permanent Court of Arbitration was established as a result of these conferences.

First World War—Covenant of the League of Nations, 1919—The Treaty of Versailles concluded between the Allied and Associated Powers and Germany on June 28, 1919, after the first World War laid the fundation of the

League of Nations for the purpose of maintaining international peace and security and the promotion of international co-operation. It appeared at the first sight that with the different organs of the League it would attain the stature of a true international organization that would break the barriers between States and bring about an era of peace and amity. Such hopes, however, were soon belied.

We find that the Permanent Court of International Justice was established in 1921 in accordance with the provisions of Article 14 of the Covenant of the League of Nations.

Treaty of Locarno, 1925 .- It was concluded on November 16, 1925, between France, Great Britain, Germany, Italy and Belgium whereby Germany, France and Belgium undertook to maintain their present mutual frontiers and to abstain from the use of force against each other. Britain and Italy guaranteed the Pact assuring mutual assistance in the event of violation. The treaty emphasized the belief of nations to settle their disputes peaceably in accordance with the Covenant of the League of Nations. In 1936 Germany renounced this treaty alleging that the mutual assistance pact between France and Soviet Russia was incompatible with the Locarno Pact.

Kellogg-Briand Pact, 1928.—Close on the heels of the Treaty of Locarno, an international agreement was signed in 1928 on the initiative of Frank B. Kellogg, U. S. Foreign Secretary, by which almost all the nations of the world condemned war as an instrument of settling international disputes

and pledged to settle their differences by peaceful methods.

The Geneva Conventions, 1929.—Representatives of 47 Governments adopted at the instance of the Swiss Government at Geneva Conventions on the Treatment of Prisoners of War and Amelioration of the Condition of the Wounded and Sick in Armies in the field. The Convention on Treatment of Prisoners of War prohibited reprisals, cruel treatment of prisoners and collective penaltics for acts of individuals. The other Convention granted immunities to medical units and persons engaged in the care of the sick and the wounded.

Codification of International Law .- The end of the first world war and the establishment of the League of Nations also witnessed sincere attempts at codification of International Law, which have been discussed in detail in a

subsequent chapter on codification.

Second World War .- The end of the Second World War witnessed the birth of another International Organisation, viz., the United Nations. Its Charter was signed by fifty States at San Francisco on the 26th June, 1945. The United Nations came into existence on the 24th October, 1945, when the Charter was ratified by the five original members and a majority of the other ignatories. This world organization is the hope of mankind and contains within itself the germs of the world order based on the idea of Onc World. It s the foundation upon which the new world based upon the maintenance of nternational peace and security and promotion of human welfare is to be milt.

The two world wars considerably affected the prestige of International aw, as the law binding on the States in their relations with one another, out its status was rehabilitated on the restoration of peace; the vanquished ations and war criminals frequently invoked rules of International Law in astification of their action. The establishment of the United Nations is, lowever, another important landmark in the development of International aw regulating the dealings of civilized States with one another.

The setting up of International Military Tribunals at Nuremburg and

Tokyo and their judgments have laid the foundation of international criminal laws.

The Universal Declaration of Human Rights (1948), the European Convention for the Protection of Human Rights and Fundamental Freedom (1950) and the various Conventions on Genocide and on the Status of Refugees adopted by the U. N. are, in effect, treaties which add to the body of international conduct regulated by law.

The long term task of building up a world rule of law through conventions, judgments and authoritative expositions of the International Court of Justice and codification is being pursued systematically by the U. N.

Lessons from the history of Law of Nations.—A study of the development of International Law reveals, according to Oppenheim<sup>1</sup> the following lessons:

(1) The first moral is that the progress of International Law is intimately connected with the victory everywhere of constitutional government over autocratic government, or of democracy over autocracy.

(2) The second moral is that the principle of nationality is of such force that it is fruitless to try to stop its victory.

(3) The third moral is that the progress of International Law depends to a great extent upon whether the legal school of international jurists prevails over the diplomatic school.

(4) The last moral is that the progressive development of International Law depends chiefly upon the standard of public morality, on the one hand, and, on the other, upon economic interests.

#### CHAPTER IV

## LAW OF NATURE AND ITS INFLUENCE ON THE DEVELOPMENT OF INTERNATIONAL LAW

The law of nature is that portion of morality which supplies the more important and universal rules for governance of the outward acts of mankind. It is written by the fingers of nature in the hearts of mankind. It consists of the rules which nature, personified as a guiding power, is deemed to have evolved and prescribed. Such rules are the principles of natural right and wrong or the principles of justice in its widest sense. Greek philosophers thought that the material and moral phenomena of the world could be resolved into some simple and general rules and they called them the law a nature.

Natural law is also known as Divine Law (being the command of God imposed upon men), unwritten law (not written on brazen tablets or on pillars), universal or common law (being of universal validity), law of reason (being established by that Reason which governs the world) and eternal law (being uncreated and immutable). The true connotation of the term 'natural law' will appear from the views of eminent thinkers enunciated below.

Justinian.—"Natural law (Jure naturalia) which is observed requally in all nations, being established by divine providence, remains for ever scaled and immutable; but that law which each State has established for itself is often changed either by legislation or by the tacit consent of the people."

1. Oppenheim: International Law, Vol. 1, 8th Ed. pp. 68-88.

Hooker.—"The law of reason for human nature is that which men by discourse of natural reason have rightly found out themselves to be all for ever bound unto in their actions."

Christian Thomasius.—"Natural Law is a divine law written in the hearts of all men, obliging them to do those things which are necessarily consonant to the rational nature of mankind, and to refrain from those things which are repugnant to it.

There is no doubt that natural law has had great influence on the development of the law of nations in its early stages. From the days of Greeks down to seventeenth century the natural law which was the law constituted by right reason, deriving its force not from the specific agreements between States but from the universal principles of right and wrong which are immanent, immutable and eternal, largely governed the relations of individual States. Such rules of right and wrong were, no doubt, not concrete and could not be reduced to abstract principles which could be applied without any difficulty at all times, but still there was the general recognition that such an eternal law existed, and that ultimately paved the way for the development of the modern law of nations.

The Greeks.—The Greeks were more civilized than their neighbours whom they regarded as barbarians. They drew a distinction between the Hellenic circle and the States falling outside it. Non-Hellenics were destined-by nature to be the slaves of the Greeks; the laws of the Hellen es were derived from the law of reason or divine law, obliging them to act in consonance with the rational nature of mankind. We thus find that in Europe the Greek City States left to history the example of a community of life based on common race, religion, customs and language. They developed the idea of Jus naturale, looking upon the universe as being guided by a funda mental principle, which they called the law of nature. "They thought", observes Sir Henry Maine, "that the material and moral phenomen a of the world could be resolved into simple and general rule and they called them the Laws of Nature. They are the rules which Nature personified as a guiding power, is deemed to have evolved and prescribed."

The Stoic philosophers towards the end of the Republican era developed this conception of nature by giving it an ethical colouring and saying that "the guiding principle immanent in the universe is Divine Reason, and Natural or Universal Law is its expression..... The whole duty of man is to live according to Nature—to lead a simple life, always acting according to the dictates of Reason which God has given him. The Law of Nature thus virtually comes to mean the Law of Reason—the law which is implanted by Nature in the breast of each individual and which does not depend for its obligation on the sanctions of any external authority."

Fenwick, therefore, rightly observes that "it is to the Greek city states and to their great philosophers that we must look for the earliest affirmation of this 'higher law' and for the most emphatic recognition of its authority. The Laws of the Hellenes' as they were called, consisted partly of customs based upon natural or universal law and partly of express conventions between the separate city states."

The Romans.—The Romans had an advanced notion of International Law which they evolved with the help of natural law. They had two sets

Romans; and Romans and customs applicable to

multilateral convention generally accepted. He admitted that in character the second process was legislative and political. The two processes, that of scientific determination of the law and that of achieving the adoption of machinery for rendering the law so defined and determined binding on States, observes Sir Cecil Hurst, get mixed up together. That is precisely what happened at the Codification Conference of 1930.1

Advantages of Codification.—We have seen earlier that International Law is defective on account of its provisions being uncertain, not easily ascertainable and obscure. Codification would, however, provide a systematic arrangement of the law. The advantages of codification may be summed up as under:

- (1) Codification tends to render the law readily ascertainable and to obtain unity over a large area. The weakness of International Law lies in its uncertainty. The existing international legislative machinery is not as efficacious at that of the State legislative machinery. Codification by reconciling conflicting views among different States binds the different units to a large part of law, which otherwise would remain a subject for divergent conflicting opinions.
- (2) A carefully close knit code greatly assists the Judge in dispensing justice. By the process of interpretation, the Judges can deal with many a fault that usually creep in the codification.
- (3) The growth of the law through custom moves very slowly. With the advance of civilization, creation of new interests and new inventions the social fabric is becoming complex day by day. Circumstances and conditions frequently change so rapidly that the customary law of a State finds it difficult to keep pace with them. Codification, therefore, becomes a necessity to deal with these developments, and stimulates the science of law.
- (4) Disagreement and confusion that prevails on many an important matter will disappear when the law is codified.
- (5) It will greatly help the International Court of Justice and other tribunals to decide disputes when there is a Code consolidating the otherwise diversified law.
- (6) The codification of International Law adds to its clarity and authority and results, to some extent, in the willingness of States to submit to obligatory judicial or arbitral settlement, if they entertain doubt as to its correct interpretation.
- (7) Finally, there are numerous lacunae in the existing state of International Law so that many matters have not yielded to any rule. Godification would fill up such lacunae and bring uniformity in the system.

Disadvantages of Codification.—1. The most common objection against codification is that it stereotypes the natural growth of law and cuts off its organic growth. It cramps and impedes the free and natural growth of law. It is said that "International Law must be a living, growing, developing organism and that any attempt to reduce it to a series of written propositions must have the effect of strangling its development, that even if it be possible to arrive at a satisfactory statement of the rule of today, it will not be satisfactory for tomorrow, because the rule of law must respond to and regulate the conditions of the moment, and if the conditions change, the rule of law ceases to respond to the requirements of the situatians."

<sup>1.</sup> Sir Ceril J. B. Hur t: International Law-The Collected Papers, p. 143.

The objection is repelled by the fact that a code makes the full maturity of a system of law and there is bound to be a regular and scientific revision through the acceptance of additional rules rendered necessary by the changes in international conditions.

- 2. According to Roscoe Pound, "Law must be suitable and yet it cannot be standstill. Hence all thinking of law has struggled to reconcile the conflicting demands of change......Continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security. Thus the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern."
- It is often remarked that codification leads \*to new fresh controversies by making the law rigid and inadaptable to new situations.
- 4. International Law is still in its infancy and, with the social cataclysm from which we have just emerged bringing about radical transformations in the international relations, most of the States do not believe in the efficacy of International Law but only in the efficacy of treaties made between states and are apprehensive of strictly judicial solutions which do not always appear to conform to the realities of international life. They, therefore, prefer solutions lased on political expediency or compromise.

In order to obviate this shortcoming, partial codification may easily be undertaken embracing within itself out of the general body of the law of nations at least those precepts which are manifestly in force and discarding those which have fallen into desuetude. It has also been suggested that the only way to restore the prestige of International Law is to carry out its complete codification.

- 5. Another criticism levelled against codification is that there is a hair-splitting tendency on the part of Judges to interpret the law, which often clings more to the letter of the law rather than to its spirit and principles. In fairness it ought to be stated that codification clears up many controversial questions of law and a periodical revision is necessary with a view to keeping the code up-to-date and abreast of time.
- Finally it is said that the law gets its inadaptability from codification, inasmuch as on account of its rigidity many cases may not be covered by the codified law.

On the whole the advantages of codification far outweigh the defects of the statute law, for it brings simplicity, symmetry, intelligibility and logical coherence. The science of law receives a fresh stimulus and, if codification is carefully planned and systematically arranged, many of its disadvantages can be avoided.

Difficulties of Codification—The chief difficulty, however, in the way of codification, as Sir Cecil Hurst aptly remarks, is that "if it is left to governments to meet in conference for the purpose of deciding what are the rules of International Law, it is inevitable that their efforts will be directed to agreeing—or trying to agree—on the rules of International Law as they ought to be i. e., the rules which would be appropriate to their present-day requirements; and the delegates will find that the requirements of the governments are so diversified, so contrary, that agreement is impossible."

The difficulty of codification of International Law is further enhanced on account of the fact that the existing law is not well settled in the form of

1. Sir Cecil Hurst : The Collected Papers, p. 146.

customary rules generally accepted or of judicial precedents or of enactments to enable the draftsman to make an orderly arrangement of the law by devoting himself not to the substance or policy of the law but with the form of its presentation. The international codifier is, however, not required to confine his attention to the form of the law but to its substance, to fill up gaps where the law is uncertain "and to give precision to abstract general principles of which the practical application is unsettled." "In circumstances such as these," observes Brierly, "codification has ceased to be a technical task which can be entrusted to lawyers; it has become a political matter, a task of law creation, and in the absence of any international organ of legislative powers the contents of the code can be settled only if the representatives of governments can agree upon them.1 This undoubtedly is a very difficult task as was experienced at the Hague Codification Conference convened by the League of Nations in 1930. On account of these difficulties international lawyers like Sir Cecil Hurst advocate the enunciation of the rules of customary International Law in the form of a statement or series of statements by a group of independent non-governmental international lawyers of different nationalities. But here again such statements of law will have not binding authority, except for the intrinsic merit that it might have, and will always be subject to revision.

The work of the International Law Commission is, however, in the right direction and should succeed if it is assured of the goodwill of the States. But Fenwick very pertinently observes that the objective of codification announced in the Charter of the United Nations can be attained without great difficulty in respect to certain of the less important relations of States, where the conflict of interests is not acute. In respect to various fields in which national interests are in conflict much will depend upon the degree of mutual confidence that exists in the international community. "A few of the lesser interests of the nations may yield to agreements of codification, but until collective security can be attained and the issue of national defence loses something of its dominant character, governments will doubtless continue to hesitate to commit themselves to treaty obligations which they believe may limit their freedom of action in unforeseen ways. Progress for the present will more likely be in the direction of agreements in non-controversial economic and social fields, leaving political issues to be settled item by item as the particular problem arises, in other words by a procedure that would

fall under the 'development' rather than the codification of the law."2

Short History.—The idea of codification of the Law of Nations was first mooted by Bentham at the end of the eighteenth century. He suggested a utopian International Law which could be the basis of an everlesting peace between the civilized States.

The National Convention of France resolved in the year 1792 to proclaim a Declaration of the Rights of Nations. Abbe Gregoire, who had been charged with the duty of drafting a declaration by the Convention, produced in the year 1795 a draft of 21 articles, which was eventually rejected by the Con-

vention

Declaration of Paris .- Real codification was aimed at under the Declaration of Paris in the year 1856, which was signed by Great Britain, France, Austria, Russia, Prussia, Sardinia and Turkey at the end of the Criman War. It laid down four principles :

(1) Privateering is to be abelished;

Brierly: The Law of Nations, 5th Ed., p. 80.
 Fenwick, Charles G.; International Law, 1967 Ed., p. 105.

- (2) Neutral flag covers enemy goods with the exception of contraband of war;
- (3) Neutral goods under enemy flag are not liable to capture except the contraband of war; and

(4) Blockade, in order to be real and binding, must be effective.

was made in 1861 by an Austrian jurist, Alfons von Domin Petrushevecz who published at Leipzig his code entitled Precis d'un code de droit international showing the possibility of codification of International Law.

In 1863 Professor Francis Lieber of the Columbia University Law School, New York, drafted the Laws of War in a body of rules, which the United States published as "Instructions for the Government of Armies of the United States on the Field."

In 1868 Bluntschli, the celeberated Swiss interpreter of the Law of Nations, published a well known draft code Das moderne Volkerrecht der civilisirten Staaten als Rechtbuch dorgestellt, which received wide publicity and was translated into several languages.

The Treaty of Washington concluded on May 8, 1871, between U.S. A. and Her Britannic Majesty, besides providing for a settlement of their differences, also laid down obligation of a neutral government as to fitting out vessels in its waters and as to the use of its ports.

In the year 1872 Dudley Field published at New York "Draft Outlines of an International Code."

In 1873, the Institute of International Law comprising jurists of all nations was founded at Ghent in Belgium, which has produced a number of drafts concerning various parts of International Law. In the same year was also founded the Association for the Reform and Codification of the Law of Nations, now termed as the International Law Association.

In 1874 at the initiative of the Emperor Alexander II of Russia the Brussels Cenference drafted a body of sixty articles under the name of the Declaration of Brussels, but those articles were not ratified by the powers.

In 1880 the Institute of International Law published its Manuel des lois de la guerre sur terre.

In 1887 Leon Levi published his International Law with Materials for a Code of International Law.

In 1890 the Italian jurist Pasquale Fiore published his code of International Law. Its fifth edition appeared in 1915.

In 1906 E. Duplexis published his Code of International Law.

In 1911 Jerome Internoscia published his New Code of International Law in English, French and Italian. Epitaciou Pessoa also published his Code in the same year.

The Hgue Conferences.—In the year 1899, the Hague Conference, convened on the initiative of the Emperor Nicholas II of Russia, produced two important Conventions, in the form of a code. viz.

- (a) Convention for the Pacific Settlement of International Disputes, and
- (b) Convention with respect to the Laws and Customs of War on Land.

The conference was attended by 26 powers. Its conventions are landmarks in the codification of International Law. The Second Hague Conference of 1907 produced thirteen conventions, some of which are codifications of parts of maritime law. They also dealt with regulations concerning warfare and neutrality in war on land and sea, the status of enemy merchantmen at the outbreak of hostilities, conversion of merchantmen into men-of-war, bombardment by naval forces, and laying of automatic submarine contact mines. Three of the thirteen conventions were a reproduction of three corresponding conventions of the First Hague Peace Conference, these being convention for the pacific settlement of international disputes, that concerning laws and customs of war on land and that concerning the adaptation of the principles of the Geneva Convention to maritime war. The conference was attended by 44 independent sovereign States

Conference of 1909 to draw up agreed lists of goods for contraband purposes. Its decisions were incorporated in the Declaration of London (1909), but the Declaration did not come into force for want of ratification. The impact of total war at first in 1914 and then in 1939 reduced the Declaration of London as devoid of any vestige of authority.

In 1913 the Institute of International Law published its Manuel de la guerre maritime.

committee of international jurists to carry on the work of codification in furtherance of the aims of a conference of American States at Mexico in 1901-02, the American Institute of International Law, which was founded in 1915, submitted a number of codification proposals to the American Conference in 1924. In 1928 the American Conference adopted the following seven conventions on (i) status of aliens, (ii) duties of neutral States in the event of civil strife, (iii) treaties, (iv) diplomatic functionaries, (v) consular agents, (vi) maritime neutrality, and (vii asylum.

The League of Nations.-The League of Nations took a keen interest in the codification of International Law. The Consultative Committee of Jurists set up by the Council of the League in pursuance of Article 14 of the Covenant to prepare the constituent Statute of a Permanent Court of International Justice adopted a resolution recommending the meeting of a Conference to carry on the work of the First and Second Peace Conferences at The Hague. It required the Conference to devote itself to the task of reestablishing the existing rules of the Law of Nations, particularly those affected by the events of the war. In September 1924, the Council of the League on the recommendation of the fifth Assembly appointed a Committee of experts to report on the codification of International Law and to select topics ripe for codification. In its report in 1927 the Committee submitted the following topics as it for codification : (1' Nationality ; (2) Territorial Waters; 3) Responsibility of a State for damage done in its territory to the person or property of foreigners; (4) Diplomatic privileges and immunities; (5) Procedure of international conferences and procedure for the conclusion and drafting of treaties; (6) Piracy; and (7) Exploitation of the products of the sea.

In September, 1927, the Assembly examined the Committee's report to the Council and the Council's observations thereon and convened a conference at The Hague for the purpose of codifying the law on the following three topics, viz.,

- 1. Nationality;
- 2. Territorial Waters; and

1

 Responsibility of a State for damages done on its territory to the person or property of foreigners.

In pursuance of the above the first conference on the Progressive Codification of International Law was held at The Hague from March 13 to April 12, 1930. It resolved itself into three committees for each of the three topics. As a result of the deliberations of the first committee on Nationality the conference adopted: (a a convention concerning certain questions relating to the Conflict of Nationality Laws; (b) a protocol relating to military obligations in certain cases of double nationality; (c) a protocol relating to a Certain Case of Statelessness; and (d) a special protocol concerning Statelessness. These conventions were subsequently ratified by a number of States. No convention with regard to territorial waters could, however, be adopted by the committee entrusted with the task for want of agreement on the question of the width of territorial waters and the problem of a contiguous zone' adjacent thereto. The Conference also could not reach agreement on State Responsibility, especially, with regard to treatment of resident aliens.

Oppenheim on the Hague Conference of 1930 .- Discussing the experience and result of the Hague Conference of 1930, with a view to assessing the desirability and the prospects of codification, Oppenheim observes that the Conference, in the first instance, revealed clearly the difference between codification conceived as a systematisation and unification of agreed principles and codification regarded as agreement on hitherto divergent views and practices. Its progress and results showed that different methods were required for the achievement of either of the two purposes. Secondly, in view of the fact that international conferences are governed by the rule of unanimity, there was a danger that attempts to reach agreement in the form of codified rules might result in reducing the value of the rules eventually agreed upon for the reason that the issue might be unduly determined by the most persistent or least progressive State or States. Thirdly, there was the danger that, given the cautious attitude of Governments, attempts at codification might in many cases reveal and emphasize differences in cases where agreement was hitherto supposed to exist. Fourthly, it appeared that in so far as codification implied uniform regulation, its scope was limited due to diversity of interests and conditions, which rendered uniformity difficult or undesirable. And, lastly, the Conference showed that even with regard to generally non-controversial matters the work of codification required lengthy preparation and discussion.

In the domain of the law of war also a number of conventions were drawn up under the auspices of the League. Article 171 of the Treaty of Versailles prohibited the use of asphyxiating, poisonous or other gases and forbade its manufacture in Germany. An attempt was made at the Washington Conference of 1921-22 to arrive at an agreement upon a limitation of armaments, but the Conference went beyond its primary task by drawing up rules of warfare restricting the use of poisonous gases and the methods of submarine warfare. Its labours in this field should be classed as new legislation rather than as a codification of the existing law.

In the year 1923 a Commission of jurists produced a Code of Air Warfare Rules.

In 1925 a number of States met at a special conference convened by the Council of the League and signed a protocol prohibiting the use in war of asphyxiating, poisonous or other gases. In July 1929 at a conference convened by the Swiss Government representatives of forty-seven States produced revised conventions on the treatment of the sick and wounded in armies in the field and the treatment of prisoners of war.

U.N. Charter and Codification.—Article 13 of the Charter of the United Nations gives ample scope for the codification of international Law. It reads:

"1. The General Assembly shall initiate studies and make recommendations for the purpose of—

A. Promoting international co-operation in the political field and encou-

The International Law Commission.—The International Law Commission of the United Nations was set up by a resolution of the General Assembly, dated November 21, 1947, in order to implement Article 13 (1) (a) of the Charter, whereby the General Assembly is charged with the initiation of studies and the making of recommendations for the purpose of encouraging the progressive development of International Law and its codification. The activities of the Commission are regulated by a statute annexed to the resolution.

The Statute of the International Law Commission provides in Article 1 that the Commission shall have for its object the promotion of the progressive development of International Law and its codification. It is concerned primarily with Public International Law, but is not precluded from entering upon the field of Private International Law.

Statute.—The Commission consists of fifteen members, who, in accordance with Article 2, must be persons of recognized competence in International Law. No two members of the Commission are to be nationals of the same State. The members of the Commission are elected by the General Assembly for a three-year term from a list of candidates nominated by the Governments of Members of the United Nations. By a resolution adopted by the General Assembly at its tenth session in 1955, the term of office was, as from January 1, 1957, changed to five years. (Art 3).

Under Article 18, the Commission is charged with the task of surveying the whole field of International Law with a view to selecting topics for codification, having in mind existing drafts whether governmental or not.

When the Commission considers that the codification of a particular topic is necessary or desirable, it has to submit its recommendations to the General Assembly. Its drafts to the General Assembly are to be in the form of articles together with a commentary containing—

- (a) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine.
- (b) Conclusions relevant to-
  - (i) The extent of agreement on each point in the practice of States and in doctrine;
  - (ii) Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution. (Art. 20).

Under Article 24, the Commission is charged with the task of finding ways and means for making the evidence of customary International Law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of International Law, and has to make a report to the General Assembly on this matter.

On November 21, 1947, the General Assembly directed the Commision to

(a) formulate the principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal, and (b) prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above. The Commission was also asked to prepare a draft declaration on the rights and duties of States and to study the desirability and possibility of establishing an international judicial organ for the trial of genocide and certain other crimes.

Beginning in 1949, the Commission cach year has held one session lasting from eight to eleven weeks. Since it began its work, the Commission prepared a draft declaration on the rights and duties of States; formulated the principles of international penal law recognized in the Charter and judgment of the Nuremberg Tribunal; prepared a draft code of offences against the peace and security of mankind; studied the question of defining aggression; expressed an opinion regarding the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide and certain other crimes; made recommendations on the problem of reservations to multilateral conventions; prepared draft conventions on the elimination or reduction of future statelessness; and submitted proposals concerning the ways and means for making the evidence of customary international law more readily available.

Survey of International Law and the selection of Topics for Codification.—The Commission decided to give priority to the following three topics. (i) Law of Treaties, (ii) Arbitral Procedure, and (iii) Regime of the High Seas.

Draft Declaration on Rights and Duties of States.—The Commission then entrusted itself to the task of preparing a draft Declaration on the rights and duties of States, taking as a basis of discussion the draft Declaration on the Rights and Duties of States presented by Panama, and taking into consideration the other documents and drafts on the subject. It prepared a declaration for being adopted and proclaimed by the General Assembly as a standard of conduct and not as a system of binding rules. The various articles—14 in number—declared four rights of States, viz., those of independence; of jurisdiction over State territory; and, subject to the immunities International Law recognizes, over all persons and things therein; of equality; and of individual or collective self-defence against armed attack.

The duties of State include the duty of non-intervention, of refraining from fomenting civil strife in the territory of another State, of ensuring that conditions prevailing in its territory do not menace international peace and order, of refraining from resorting to war, using threat or force against the territorial integrity or political independence of another State, or in any other manner inconsistent with International Law and Order, of abiding by customary and conventional International Law, of settling disputes by peaceful rights and fundamental freedoms, without distinction as to race, sex, language or religion.

By October 1952, eighteen member-States had sent in their comments. The Sixth Legal Committee of the Assembly's fifth session decided to await final reports before considering the draft Declaration on Rights and Duties of States. No comment has been received since that date, and no further development has taken place. The Draft Declaration still remains a draft and has failed

Formulation of the Nuremberg Principles.—At its second session (June 5-July 29, 1950), the Commission formulated a set of seven Principles of

International Law recognized in the Charter and in the judgment of the Nuremberg Tribunal. These are:

- (1) Any person who commits an act which constitutes a crime under International Law is responsible therefor and liable to punishment.
- (2) The fact that internal law does not impose a penalty for an act which constitutes a crime under International Law does not relieve the person who committed the act from responsibility under International Law.
- (3) The fact that a person who committed an act which constitutes a crime under International Law acted as Head of State or responsible Government official does not relieve him from responsibility under International Law.
- (4) The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under International Law, provided a moral choice was in fact possible to him.
- (5) Any person charged with a crime under International Law has the right to a fair trial on the facts and law.
- (6) The crimes hereinafter set out are punishable as crimes under International Law: (a) Crimes against peace; (b) War crimes; and (c) Crimes against humanity.
- (7) Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle (6) is crime under International Law.

The Assembly at its 1950 session sent the Commission's formulation to member-governments for their comment. The Assembly requested the Commission in preparing a draft code of offences against the peace and security of mankind, to take account of observations on the Nuremberg Principles made during the session or subsequently received from governments.

Customary International Law.—At its second session the Commission reported that the widest possible distribution be made of publications relating to International Law issued by organs of the United Nations; that the Assembly might authorize the Secretariat to prepare and widely distribute eight groups of publications which would make the evidence of customary International Law more readily available and that the Assembly might call to the attention of governments the desirability of their publishing digests of their diplomatic correspondence.

On the basis of that report, the Assembly at its sixth session noted with satisfaction that a repertoire relating to the interpretation of the Charter was already under way, and requested the Secretary-General to submit a report as to possible publication of a United Nations juridical year book, a consolidated index to the League of Nations Treaty Series, a supplementary list of treaty collections, and a repertoire of the practice of the Security Council. At its eleventh session, the Assembly authorized the Secretary-General to undertake the publication (a) of a list of treaty collections, and (b) of a repertoire of the practice of the Security Council. A repertoire of the practice of the Security Council 1946-1952 was published in 1954, with supplements covering the year 1952-1958. A list of treaty collections was published in November 1955.

Reservations to Multilateral Co. ventions.—The Commission recommended that in preparing future conventions it was desirable that the organs of the United Nations, specialised agencies and States might insert provisions as to the admissibility or non-admissibility of reservations and as to the effect to be attributed to them. The General Assembly on the 12th January, 1952, endorsed the Commission's recommendation that provisions regarding reserva-

tions should be inserted in future conventions. It also recommended to all States that they be guided by the advisory opinion of the International Court of Justice in regard to the Genocide Convention.

Definition of Aggression.—Although the Commission was at first averse to defining aggression at its third session held in Geneva from May 16 to July 27, 1951, due to the difficulty of its enumeration, it decided on reconsideration to embody a general definition of aggression in the draft code of offences against the peace and security of mankind. It further included in the term "aggression" any act of aggression, including the employment by the authority of a State, of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.

At its sixth session the Assembly discussed the subject and came to the conclusion that it was possible and desirable to define aggression by reference to the elements which constitute the crime. The Assembly's discussion at the seventh session revealed the complexity of the question, and many members challenged the practical value of a definition. The Assembly recognised that detailed study was called for on the forms of aggression; the connection between a definition and the maintenance of peace; the question of the place of the definition on the Code of Offences against the peace and security of mankind; and the effect of a definition on the work of United Nations organs. The Assembly decided that all these problems should be studied by an expert group. At the 1952 session the Assembly decided to establish a fifteen-member Special Committee with a request that it should submit to the Assembly at the ninth session draft definitions of aggression or draft statements of the notion of aggression. The Committee considered the questions raised by the Assembly at its seventh session, and decided to transmit the several texts presented to it, which aimed at defining in one form or another, aggression, to the General Assembly and, for comments, to member States. At the 1954 session of the Assembly, the opinion was again divided as to the desirability of defining aggression and with regard to the type of definition to be adopted. coordinate the views expressed in the discussions, the General Assembly to establish another Special Committee consisting of nineteen incibers and requested it to report to the e eventh session of the Assembly scheduled to meet in 1956. In 1970, the Committee established a working group of eight members, who reported to the Committee its assessment of the progress made during the 1970 session indicating the points of agreement and disagreement. At the 25th session the General Assembly took note of the gress made by the Special Committee and of the common desire of its members to continue their work on the basis of the results achieved and to arrive at a draft definition.

Draft Code of Offences against the Peace and Security of Mankind.—The Commission prepared a draft on this topic at its second session which was submitted to the Assembly at its 1950 session. The Assembly invited comments from member governments.

At its third session in 1951, the Commission drafted a code limiting its scope to offences containing a political element and endangering or disturbing the maintenance of international peace and security. The offences enumerated in the code were defined as "crimes under International Law." The Commission decided that only individuals should be punished for such crimes and that no provisions be made with respect to crimes by abstract entities.

The draft code included, among others, the following offences, viz., act of aggression, threat of aggression, preparation by the authorities of a State for the employment of armed force against another State for any purpose other

competent organ of the United Nations; incursion into the territory of a State from another State by armed bands acting for a political purpose; acts by State authorities connected with fomenting civil strife or terrorist activities in another State; annexation of a territory in violation of International Law; genocide by authorities of a State or by private individuals, inhuman acts against the civilian population; acts in violation of the laws of war, etc. The Commission observed that the fact that a person acted as head of a State, or as a responsible government official did not relieve him from responsibility. If a person acted pursuant to an order of his government or of a superior, he would be responsible only if a moral choice were in fact possible for him.

The Commission did not frame an instrument for implementing the code pending the establishment of an international criminal court and left its application to national courts without prescribing a definite penalty for each offence.

At its 1951 session the Assembly decided to postpone consideration of the draft code until the 1952 session. The Commission, however, took up the matter again at its fifth session in 1953, and requested the special rapporteur to prepare a new report for submission at the sixth session. That report discussed the observations received from governments and proposed certain changes in the text previously adopted by the Commission. The Commission decided to modify its previous text in certain respects, by, inter alia, adding a new offence to the list of crimes, namely the intervention by the authorities of a state in the internal or external affairs of another state by means of coercive measures. It also decided to omit the condition that inhuman acts against a civil population were crimes only when committed in connection with other offences defined in the code. The rule regarding crimes committed under order by a superior was reworded to say that the perpetrator of such a crime would be responsible if, under the circumstances at the time, it was possible for him not to comply with the order. At its 1954 session, the General Assembly, considering that the draft code raised problems closely related to that of the definition of aggression, decided to postpone further consideration of the draft code until the new special committee on the question of defining aggression had submitted its report.

Regime of the High Seas.—At its third session the Commission defined the "continental shelf" as that part of the sea-bed contiguous to the coast, but outside the areas of marginal seas, where the depth of the superjacent waters admitted of the exploitation of natural resources of the sea-bed and subsoil. The coastal State might exercise control and jurisdiction for the purpose of exploiting the natural resources of the shelf but the legal status of the superjacent waters and of the air space above might not be affected thereby. In particular there should be no substantial interference with navigation or fishing, though safety zones might be established around installations constructed on the shelf.

The Commission also considered various other topics falling within the regime of the high seas like nationality of ships, penal jurisdiction in matters of collision, safety of life at sea, right of warships to approach foreign vessels suspected of piracy or the slave trade, submarine telegraph cables, hot pursuit, etc., and the rules framed by the special rapporteur were communicated to governments for their comments.

At its seventh session, the Commission considered the report submitted by the rapporteur, and adopted 38 provisional articles concerning the regime of the high seas. These articles were circulated to governments for comment. After examining the comments by governments on the drafts previously prepared, the Commission at its eighth session in 1956 proposed to group

8

together systematically in a single report all the rules adopted by it in respect of the high seas, the territorial sea, the continental shelf, contiguous zones, fisheries, and the protection of the living resources of the sea.

The Geneva Conference on the Law of the Sea adopted four Conventions in 1958, viz., Conventions on (1) the Territorial Sea and the Contiguous Zone, (2) High Seas, (3) Fishing and the Conservation of the Living Resources of the High Seas and (4) the Continental Shelf The Law of the Sea Conventions are of primary interest to the international community, though they are concerned with special regimes.

The Convention on the Territorial Sea and the Contiguous Zone deals with the baseliness from which the territorial sea is measured both in normal cases and in the cases of bays, roadsteads and islands. It contains a section on the right of innocent passage, both of merchant vessels and warships, and it furthermore defines the right of control to be exercised by the coastal state in the contiguous zone. The Convention does not include any provision defining the breadth of the territorial sea, for on this question no agreement could be reached.

The Convention on the High Seas sets out in general the conditions under which freedom of the high seas may be exercised. It deals, inter alia, with such matters as freedom of access to the high teas, nationality of ships, safety at sea, jurisdiction in the event of collision, slave-trading, piracy, hot pursuit, pollution by oil and radioactive waste, and the laying of submarine cables and pipelines.

The Convention on Fishing and the Conservation of the Living Resources of the High Seas sets up a regime to ensure conservation which includes a procedure for the settlement of disputes by a special commission whose decisions shall be binding.

The Convention on the Continental Shelf defines the rights that the coastal state may exercise over the continental shelf.

In addition to the four conventions detailed above, the conference adopted on Optional Protocol of Signature concerning the Compulsory Settlement of Disputes which provides for the compulsory jurisdiction of the International Court of Justice or, if the parties so prefer, for submission of the dispute to conciliation or arbitration.

The conference also adopted nine resolutions on the following subjects: nuclear tests on the high seas; pollution of the high seas by radioactive materials; international fishery conservation conventions; cooperation in conservation measures; humane killing of marine life; special situations relating to coastal fisheries; regime of historic waters; convening of a second United Nations Conference on the Law of the Sea; and a tribute to the International Law Commission.

The Final Act of the conference was signed on April 29, 1958.

International Criminal Jurisdiction.—The Commission examined the desirability of establishing an international judicial organ for the trial of genocide and certain other crimes at its second session. In 1950 it considered the establishment of a separate international criminal court as both possible and desirable but it was against such a court being set up as a chamber of the International Court of Justice.

At its fifth session the Assembly set up a special Committee to prepare a draft convention relating to the establishment and statute of an international criminal court. The Committee met in Geneva in August 1951 and completed a draft statute for an international court.

The Committee made the following, among other, recommendations, viz., the setting up of the court by means of a convention-rather than by a General Assembly resolution-concluded under United Nations auspices by a conference called by the General Assembly; a permanent, rather than an ad hoc, structure of the court which would function only when cases were submitted to it; composition of nine Judges of the court who should be of recognised competence in International Law, especially in international criminal law, they being elected for a nine year term by the States parties to the court's statute; the court's functions would be to judge crime under International Law, as might be provided in conventions or special agreements among States parties to the statute; conferring jurisdiction on the court by the conclusion among States parties to the statute of conventions to that effect relating to cases which might arise with respect to one or more groups of crimes. The Committee finally recommended that the General Assembly might invite the conference of States convoked for establishing the court to draw up at the same time a protocol conferring jurisdiction on the court in respect of the crime of genocide.

The report of the Committee together with the draft statute was sent to Governments for their comments and observations. The above draft was revised by the Committee on International Criminal Jurisdiction in 1953 at a month's session at the United Nations Headquarters. Under the revised draft statute the Court will have jurisdiction to try individuals, "whether they are constitutionally responsible rulers, public officials or private individuals"

accused of crimes generally recognized by International Law.

The nature of the crimes was not spelt out in the new draft statute, and their definition was left to future international conventions to be ratified by individual States as has been the case with the Convention on Genocide of 1948.

Under the proposed statute the Court would have power to issue warrants of arrest, but the executions of any sentences the Court might impose, is left to future conventions on the matter. The new draft statute also includes articles on nomination and election of Judges, procedure for the Court and provisions for elemency and parole. It proposes a bench made up of 15 Judges instead of nine as provided for in the Geneva draft. The Committee expressed the opinion that the Court should come into existence when a certain number of States—the exact number to be decided later—has ratified the convention containing the statute and has conferred jurisdiction upon the Court.

The report of the Committee, together with the draft statute, was communicated to governments for their observations. The Assembly decided to set up a new Committee consisting of seventeen members, which met at the United Nations Headquarters in the summer of 1953. The Committee decided that the best method of establishing an international criminal court would be by means of a convention prepared Ly an international diplomatic conference convened under the auspices of the United Nations, and that the Court should not come into existence until jurisdiction had been conferred on it by a certain number of States and until a certain number of States had ratified the convention containing the statute of the Court. The Committee also made a number of changes in the 1951 draft statute, increased the number of methods by which jurisdiction might be generally conferred on the Court by states, gave a fuller definition of the effect of conferment of jurisdiction, deleted a requirement that the General Assembly should approve the conferment of jurisdiction, and inserted a provision on the withdrawal of jurisdiction. The report of the Committee was placed before the Assembly at its 1954 session, which, considering the connection between the question of defining aggression, the draft code of offences against the peace and security of mankind and the question of an international criminal jurisdiction, decided to postpone consideration of the latter until it had taken up the report of the 1956 special committee on aggression and until it had again taken up the draft code of offences against the peace and security of mankind. At the 1957 session, the matter was deferred for consideration until such time as the Assembly took up the guestion of defining aggression and the draft code of offences against the peace ad security of mankind.

International Review of Criminal Policy,—Since 1952, the United Nations Secretariat has issued the "International Review of Criminal Policy"

The first United Nations Congress on the Prevention of Crime and the Treatment of Offenders was held in Geneva in August-September 1955 and adopted a set of Standard Minimum Rules for the Treatment of Prisoners, A final text of the Standard Minimum Rules was adopted unanimously by the Conference. The Economic and Social Council approved the rules at its 24the session in 1957.

The Secretariat for the Congress has also published a study entitled "Theorement of Juvenile Delinquency". Another study for the Congress, entitl, ed "The Prevention of Juvenile Delinquency in Selected European Countries" was also undertaken by the Institute for the Study and Treatment of Delinquency, London, at the request of the Secretariat, and was published in 1955.

Nationality, including Statelessness.—The Commission selected at its first session nationality, including statelessness as a topic for codification. The subject related to two problems, mz., the nationality of married women and the elimination of statelessness. At its session in 1950, the Commission the nationality of married women, embodying certain principles which had been recommended by the Commission on the status of Women, these princinationality, and (b) that neither marriage nor its dissolution should affect of married persons was submitted to the Commission at its fourth session in women could not suitably be considered by it separately but only in the consion therefore did not take further action with respect to the draft.

In pursuance of a request made by the Economic and Social Council, the Commission at its fifth session in 1953 prepared two drafts for the elimination of statelessness, viz., a draft convention on the elimination of future statelessness, which were transmitted to governments for comment. The draft conventions aimed at facilitating the acquisition of the nationality of a country by another nationality was acquired. At the 1954 session of the General Assembly, a majority of representatives expressed the opinion that the time was not ripe the position of member States with respect to the draft conventions, and that sufficiently ascertained. The Assembly expressed its drsire that an international for the reduction or elimination of future statelessness as soon as at least 20 ate in such a conference.

In 1959 an International Conference of Plenipotentiaries was held at Geneva, and subsequently in New York where the United Nations Convention on the Reduction of Statelessness was adopted on August 30, 1961. The Convention required both jus sanguinis and jus soli countries to grant nationality

under certain circumstances to persons who would otherwise be stateless; "and special provisions were adopted for persons who might lose their nationality by reason of a change in personal status."

Arbitral Procedure.—At its first session in 1949, the Commission selected Arbitral Procedure as a topic for codification. On the basis of reports submitted by a special rapporteur the matter was discussed at the second, fourth and fifth sessions of the Commission. The Commission at its fourth session approved a Draft on Arbitral Procedure, which was submitted to governments for comment. The Commission at its fifth session made some alterations in the draft in the light of replies received from governments. The General Assembly at its 1953 session decided to ransmit the draft to member States for their comments. The Assembly took up the question again at its 1955 session and decided to refer back the draft to the International Law Commission, and to invite the Commission to consider the comments of governments and the discussion in the Sixth (Legal) Committee in so far as they might contribute further to the value of the draft. The Commission asked to report on the matter at the 1958 session of the Assembly. At the 1958 session the Commission prepared a model set of rules and submitted them to the General Assembly which, on November 14, 1958, decided to bring them to the attention of the member States for use in drawing up treaties of arbitration. The Assembly also asked the governments for their comments.

Vienna Convention on Diplomatic Relations, 1961.—The General Assembly resolution adopted on December 7, 1959, inter alia decided that an international conference of plenipotentiaries shall be convoked to consider the question of diplomatic intercourse and immunities and to embody the results of its work in an international convention, together with such ancillary documents as may be necessary and requested the Secretary-General to convoke the conference at Vienna not later than the spring of 1961. The Conference accordingly met in Vienna, Austria, from March 2 to April 14, 1961, in which 81 States participated. The Vienna Convention on Diplomatic Relations was signed on April 18, 1961.

The Convention on Diplomatic Relations consist of a preamble and fiftythree articles. It divides itself into four parts. The first part consisting of the first nineteen articles deals with problems of diplomatic relations in generaldefines the terms used in the Convention such as head of the mission, members of the diplomatic staff, etc., deals with the appointment of the staff of the mission, appointment of nationals of the receiving State and the size of the mission, and with the question of declaring the head of the mission or any member of the staff of the mission persona non grata. The second part comprises articles 20 to 28 and deals with well established privileges and immunities accorded to the premises of the mission and to its archives, such as inviolability (which includes means of transport of the mission), exemption from all national, regional or municipal dues and taxes, freedom of movement, freedom of communication, etc. The third part comprising articles 29 to 36 specifies the privileges and immunities, etc., to be enjoyed by a diplomatic agent such as personal inviolability, inviolablity of residence and property, immunity from civil, administrative and criminal jurisdiction, exemption from social security regulations, taxation and customs duties, etc. The last part of the Convention comprising articles 48 to 53 contains final provisions on signature, accession, ratification, entry into force of the Convention, etc.

Besides the Convention on Diplomatic Relations, the Conference adopted an Optional Protocol Concerning Acquisition of Nationality and an Optional

<sup>1.</sup> U N. Year Book, 1961, p. 553; Charles G. Fenwick: International Law, 1967, p. 314.

Protocol Concerning the Compulsory Settlement of Disputes. The Conference also adopted, amongst others, two important resolutions. The first resolution affirmed the importance of the subject of special missions and recommended to the General Assembly of the United Nations that it refer the subject to the International Law Commission fot further study in the light of the Convention on Diplomatic Relations adopted by the Conference. The second resolution entitled "Consideration of Civil Claims" recommended that the sending State should waive the immunity of members of its diplomatic mission in respect of civil claims of persons in the receiving State when this can be done without impeding the performance of the functions of the mission and that, wh n immunity is not waived, the sending State should use its best endeavours to bring about a just settlement of the claims.

The Convention marks a great stride in the field of codification and development of the rules of international law on diplomatic intercourse and immunities, a subject which had hitherto been regulated by customary international law or by bilateral arrangements.

Vienna Convention on Consular Relations, 1963.—In order to supplement the work of the Vienna Conference on Diplomatic Intercourse and Immunities in 1961, a Conference on Consular Relations met at Vienna in 1963 and adopted a Convention on Consular Relations, which codifies the limited privileges and immunities to which the members of a consular post are entitled, especially regarding acts performed in an official capacity, their archives and correspondence with their home governments, liability to taxation, their obligation to appear in person as witnesses in court and their amenability to criminal jurisdiction.

Vienna Convention on the Law of Treaties.—The topic was selected for codification at the first session of the International Law Commission. The Draft Articles on the Law of Ireaties were presented by the International I aw Commission to the General Assembly in 1966, and the General Assembly referred as the basic proposal for consideration to the international conference of plenipotentiaries. The draft articles dealt exhaustively doctrine of rebus sic stantibus and that of jus cogens, viz., treaties conflicting with a peremptory norm of general international law.

The United Nations Conference on the Law of Treaties held in Vienna from April 5 to May 22, 1969, at which 110 States were represented, adopted the Vienna Convention on the Law of Treaties, consisting of 85 articles coverapplication and interpretation and entry into force of treaties, reservations, of the Convention for signature and ratification was the culmination. The opening years of work on the subject in the International Law Commission, the Gentreaties now provide most of the legal framework of international relations, ject to dispute, the clarification of those rules in a convention is a contributions under which justice and respect for the obligations arising from treaties can be maintained."

The Vienna Convention on the Law of Treaties is the first essential element of infrastructure that has been worked out in the enormous task of codifying international law pursuant to Art. 13 of the United Nations Charter. The previous codification treaties, the four conventions on the Law of the Sea, the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on the Reduction of Statelessness, did not, despite their intrinsic importance, grapple with the fundamentals of constructing a world legal order.<sup>1</sup>

Printing of the Documents of International Law Commission.— The Assembly at its 1955 session adopted a resolution requesting the Secretary General to arrange as soon as possible for the printing of the documents of the Commission. The studies, special reports, principal draft resolutions and amendments of the first seven sessions were to be printed in their original languages; and the summary records of the first seven sessions were to be printed in English. The documents of future sessions were to be printed in English, French and Spanish.

Universal Declaration of Human Rights.—In 1943 the United Nations proclaimed the first international statement of the Rights of Man, the Universal Declaration of Human Rights. On April 6, 1950, the Human Rights Commission approved the principle of the protection by law of every

one's right and its incorporation in an international convention.

Other Conventions.—The General Assembly unanimously affirmed on the 11th December, 1946, genocide—the killing of a group of human beings as a crime under International Law which the civilized world condemns. It unanimously adopted on the 9th December, 1948, the Convention on Genocide, which makes the international crime of acts aimed at destroying a national, ethnical or racial group as such punishable whether those responsible arc rulers of States, public officials or private individuals. Five kinds of acts, aimed at destroying "a national, ethnical, racial or religious group as such" are punishable as genocide: killing members of a group, causing them serious bodily or mental harm, deliberately inflicting conditions on the group to bring about its physical destruction, imposing measures to prevent births within the group, and forcibly transferring children from it to another group. Not only genocide itself but also conspiracy or incitement to commit it, as well as attempts to commit genocide and complicity in the crime, are punishable under the convention. Whether they are constitutionally responsible rulers, public officials, or private individuals, those guilty of genocide shall be punished, according to the convention. The convention came into force on the 12th January, 1951. Fiftynine States had ratified the convention by January, 1959.

A draft convention on freedom of information and international transmission of news has also been drawn up, and is being discussed by the Social Committee of the General Assembly. An expert group under United Nations

auspices has prepared a draft code of ethics.

The various United Nations bodies are also at work on world social problems, which include forced labour, slavery, the protection of trade union rights, population studies, etc.

In July, 1951, a Convention on the Status of Refugees was adopted under United Nations auspices which is a most comprehensive charter ever written

on the rights of refugees.

The conventions such as the Convention on Genocide, 1948, the Convention on the Status of Refugees, 1951, the Geneva Convention on the Law of the Sea, 1958, the Convention on the Reduction of Statelessness, 1961, the Vienna Convention on Diplomatic Relations, 1961, the Vienna Convention on Consular Relations, 1963, and the Vienna Convention on the Law of Treaties, 1969, are, in effect, treaties which add to the body of international conduct regulated by law. The United Nations work on these conventions

1. Op. cit. Richard D. Kearney & Robert E. Dalton : The Treaty on Treaties, AJIL. Vol.

64, 1970), 495.

and on the others yet to be completed such as those on human rights, freedom of information, the political rights of women, and narcotic drugs, adds continually to International Law. A United Nations commission of eminent legal authorities is at work on the codification and development of International Law.

In 1969, the General Assembly recommended that the International Law Commission continue work on relations between States and international organizations. It also recommended that the United Nations Commission on International Trade Law continue work on four priority topics: international sale of goods, international payments, international commercial arbitration and international legislation on shipping.

In 1969 the General Assembly also adopted the Convention on Special Missions and the Optional Protocol concerning Compulsory Settlement of Disputes arising under the Convention. The 55 article Convention sets out rules of law applying to forms of ad hoc diplomacy carried out by means, other than through embassies and consulates.

The Assembly requested its Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States to meet in the first half of 1970 to complete work on a draft of seven principles.

The Tokyo Convention on Offences and certain other Acts committed on Board Aircraft, 1963, the Hague Convention for the Suppression of Unlawful of Unlawful Acts against the Montreal Convention for the Suppression landmarks in the legal compaign against hijackings. The United Nations General Assembly by its resolution adopted on November 25, 1970, called upon States to provide for the prosecution and punishment of persons who crimes. It called on States to ensure that their national legislation provided them to ensure prosecution of hijacking of civil aircraft in flight; urged of the International Civil Aviation Organization to prepare and implement a convention to make unlawful seizure of aircraft a punishable offence.

The seabed treaty, viz., the treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the seabed and the ocean floor and in the subsoil thereof adopted by the U. N. General Assembly on December 7, 1970, and the Convention on the Prohibition of Bacteriological and other Toxic Arms adopted by the U. N. 26th General relating to general disarmament.

Conclusion.—A study of the causes of the failure of the Hague Conference on Codification of 1930 as also the protracted nature of discussions in the achieve any success the task of codification must not be undertaken by governments or by their delegates. Nor should this work be done on a purely fundamental rules and principles of International Law because they look on the question from the practice of their own States, the aspirations of the ments. Their efforts are bound to be directed to agreeing on the rules of appropriate to the they ought to be, i. e., "the rules which would be the requirements of the governments are so diversified, so contrary, that

agreement is impossible." The efforts should mainly be confined to the task of ascertaining and formulating or declaring the existing rules of International Law.

The United Nations Charter lays down as one of the aims of the Organization the establishment of "conditions under which justice and respect for the obligations arising from treaties and other sources of International Law can be maintained." A number of United Nations bodies are concerned with International Law. The International Court of Justice interprets it in particular cases. The International Law Commission codifies and develops it, and special bodies such as the Committee on Principles of International Law concerning Friendly Relations and Co-operation among States and the Committee on Defining Aggression deal with particular aspects.<sup>2</sup>

### CHAPTER VI

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## RELATION BETWEEN INTERNATIONAL LAW AND AND MUNICIPAL LAW

Conflict between International Law and Municipal Law .-Before entering on a study of the fundamentals of International Law, it is necessary to study, in brief, the relationship between International Law and Municipal, State or National Law. International Law has exhaustively been defined in an earlier chapter. We have seen that it governs the relations of sovereign independent States inter se and "constitutes a legal system the rules of which it is incumbent upon all States to observe." (Municipal law, State law or national law is the law of a State or a country and in that respect is opposed to International Law, which, as said above, consists of rules which civilized States consider as binding upon them in their mutual relations. Kelsen observes that national law regulates the behaviour of individuals, International Law the behaviour of States or, as it is put, whereas national law is concerned with the "internal" relations, the so-called "domestic affairs" of the State, International Law is concerned with the "external" relations of the State, its "foreign affairs." Municipal law is the law of the sovereign over individuals subject to the sovereign rule. International Law is not law above but between States and is, therefore, weaker than Municipal Law.

The importance of the distinction between International Law and State Law cannot be overrated. Their relationship no doubt raises problems of great complexity. Numerous questions erop up which might necessitate the setting of limits between International Law and Municipal Law. To what extent the national courts are bound by the rules of International Law when the latter are or are not in conflict with Municipal Law? How far are treaty obligations Linding on national courts? Are the national officials deriving their authority from Municipal Law bound to execute international obligations even though contrary to State Law? Would the national courts apply the treaty or the conflicting State law? A solution of this seeming inconsistency necessitates a study of juristic theories and the practice of States.

2. Juristic Theories.—A lot of literature has developed on the question as to whether International Law and Municipal Law or the various national laws can be said to form a unity being manifestations of a single conception of law or whether International Law constitutes an independent system of law

<sup>1.</sup> Sir Cecil Hurst: International Law, The Collected Papers, p. 146.
2. Cff, United Nations XXV Anniversity brochuse.
3. Huss, Koben: Principles of International Law, pp. 495-406

essentially different from the Municipal Law. The former theory is called monistic and the latter dualistic.

Monistic Theory. - The monistic theory maintains that the subjects of two systems of law, viz., International Law and Municipal Law are essentially one, inasmuch as the former regulates the conduct of States, while the latter of individuals. According to this view law is essentially a command binding upon the subjects of the law independent of their will, which in one case is the States and in the other individuals. According to it International Law and Municipal Law are two phases of one and the same thing. The former although directly addressed to the States as corporate bodies is as well applicable to individuals, for States are only groups of individuals. The adherents to this theory further maintain that the origins and sources of the two laws are essentially the same, both spheres of law simultaneously regulate the conduct of individuals and the two systems are in their essence groups of commands which bind the subjects of the law independently of their will. Kelsen (of the Vienna School) holds that there is unity of law between Municipal Law and International Law and a view contrary to that violates the legal character of International Law. Duguit carried a step further and held that the subjects of International Law were not States but the individual members of States. The monistic theory asserts that International Law and Municipal Law are of the same fundamental nature, and arise from the same unity of the science of law, being manifestations of a single conception of law. Both the systems have their origin in a 'higher law' founded on the principles of right and wrong.

The adherents of this view deny any essential difference between the subjects of international and municipal law. In both cases, they observe, it is individual persons who are regulated by the law. According to Hans Kelsen, like all law International Law is a regulation of human conduct and it is men to whom International Law entrusts the responsibilities for order. It is also maintained that International Law "is not without commanding authority, and that far from being essentially different from municipal law, it must be regarded as a part of the same juristic conception."

This theory has gained prominence after the first World War and is advocated by modern writers. Monism finds its most direct antecedents in the writings of Emile Durkheim and Leon Duguit; its recent expositors being Krabbe, Kelsen, Kunz, Scelle, Verdross and Wright.

Dualistic Theory.—"According to the dualist view, the systems of International Law and of Municipal Law are separate and self-contained to the extent to which rules of the one are not expressly or tacitly received into the other system." "The two are separate bodies of legal norms, emerging, in part, from different sources, comprising different subjects, and having application to different objects." Oppenheim observes that according to this view the law of nations and the Municipal Law of the several States are essentially different from each other. In the first place, they differ as regards their sources. The sources of Municipal Law are custom grown up within the boundaries of the State concerned and statutes enacted therein, while the Nations and law making treaties concluded by the members. In the second place, Municipal Law regulates relations between the individuals under the sway of a State or between the individuals and the State while International Law regulates relations between the Family of nations.

<sup>1.</sup> Schwarzenberger: A Manual of International Law, p. 19.

Lastly, there is a difference with regard to the substance of the law inasmuch as Municipal Law is a law of a sovereign over individuals while International Law is a law between sovereign States, which is arrived at by agreement among them. The latter is, therefore, a weak law. In Municipal Law individual citizens are subjected by the power of the State; but there is no central executive authority to compel observance of its norms in International Law.

The dualists, therefore, maintain that International Law can never operate as the law of the land unless adopted by municipal custom or statutory enactment. A treaty cannot be executed so as to be binding upon persons and corporations unless enabling legislation has been passed to make its provisions effective.

The dualistic theory has mainly been advocated by Triepel (German), Anzilotti (Italian) and Oppenheim. Heinrich Triepel referring to the two fundamental differences between the two systems observes that the subjects of State law are individuals, while the subjects of International Law are States solely and exclusively and their juridical origins are different inasmuch as the source of State Law is the will of the State itself, the source of International Law is the "common will" (vereinbarung) of the States.

As to the first observation of <u>Triepel</u> we have seen that indiviauals are today, in a certain measure, subjects of International Law and they have rights in their own capacity and not derivatively through the State of which they are nationals. As to the second observation the statement begs the very question as to when the common will of States can become decisive.

Judge Anzilotti distinguished International Law from State Law by observing that the State Law is conditioned by the principle that State legislation is obligatory while International Law is conditioned by the principle pacta sunt servanda, i. e., agreements between States are to be respected. The main defect is that the norm pacta sunt servanda is only a partial explanation of the governing principle of International Law!

The conversion of a rule of International Law into municipal law (sometimes called "reception" or "incorporation" by positivists) is treated by the learned Judge as a formal and substantive transformation of International Law into municipal law, the two "orders" thus remaining "separate".

Dr. Ross holding that the dualistic construction must be regarded as the correct one observes that "national law is not derived from International Law. International Law and National Laws are independent systems. Their interconnection lies partly in the demands. International Law makes on National Law, partly in references to one another."

The dualistic theory has been criticised by the advocates of monistic theory on the grounds that there is unity in the science of law and both International Law and Municipal Law are essentially the same, regulating the conduct of individuals in two different ways. They further observe that both the phases of law, viz., International Law and Municipal Law originate from a higher law—divine law—which is based on, the principles of natural right and wrong or the principle of justice in the widest sense.

Pluralistic Theory according to Kelsen. - Kelsen calls the above two theories as the Monistic and Pluralistic theories. He does not prefer the

<sup>1.</sup> Alf Ross: A Text-Book of International Law, p. 63.

word 'dualism' as it takes into account the existence of numerous legal orders, since International Law itself establishes a relation between its norms and the norms of the different national legal orders. According to him, the pluralistic theory is in contradiction to positive law, provided International Law is considered to be a valid legal order. And yet, he remarks, the representatives of this theory accept International Law as positive law. But the plural istic view is untenable, he observes, also on logical grounds. International Law and national law cannot be different and mutually independent systems of norms if the norms of both systems are considered to be valid for the same space and at the same time. It is logically not possible to assume that simultaneously valid norms belong to different, mutually independent systems.

Kelsen rejects the pluralistic view on the ground of difference in subjectmatter between international and national law, for he says that every domestic affair of a State can be made the subject-matter of an international agreement and so be transformed into a foreign affair, and he cites the instance of the relation between employers and employees, which although a domestic affair might with the conclusion of a treaty with other States become a foreign affair

Kelsen also repels the view that International Law and national law are not parts of one normative system, because they can, and in fact do, contradict each other. He observes that the conflict between an established norm of International Law and one of national law is a conflict between a higher and a lower norm. Such conflicts occur within the national legal order without the unity of this order thereby being endangered. A so-called 'unconstitutional State' is a typical example. That a statute is 'unconstitutional' does not mean that it is null and void ab initio. It means only that if a competent court ascertains that a statute is not in conformity with certain provisions of the constitution, the statute may be annulled either only for the concrete case or for all possible cases. Hence as long as it is not annulled there exists no logical contradiction between the constitution and the so-called unconstitutional statute. Accordingly the framing of a norm violating a higher norm may be a delict to which the legal order attaches a sanction but the norm itself may be valid as long as it is not annulled. This is the case in the relationship between international and national law. A norm that is enacted in 'violation' of general International Law remains valid even according to general International Law. General International Law does not provide any procedure by which norms of national law that are 'illegal' (from the standpoint of International Law) can be abolished. Such a procedure may be established by particular International Law or by National Law

Transformation Theory.—Besides the above two theories, Strake makes reference to two other theories, viz., the Transformation and Specific Adoption Theories concerning the application of International Law within the municipal sphere and the Delegation Theory 2/

According to the transformation theory "it is the transformation of the treaty into national legislation which alone validates the extension to individuals of the rules set out in international agreements. The transformation is not merely a formal but a substantial requirement." "In order to be so applied such rules must undergo a process of specific adoption by, or specific incorporation into, Municipal Law." International Law, according to the

1. Hans Kelsen: Principles of International Law, pp. 401-47.

<sup>2.</sup> Starke : An Introduction to International Law, Fifth Edition, pp. 72-73.

transformation theory, cannot find place in the National or Municipal Law unless the latter allows its machinery to be used for that purpose. An example of the transformation of international treaty into national legislation is furnished by extradition treaties made by Great Britain. In English law there is no power to surrender fugitive criminals in extradition proceedings to a foreign country without express statutory authority. Such authority is given by Orders-in-Council made under the Extradition Act and relates only to offences therein specified. Similarly, other treaties and conventions also require national legislation for their enforcement.

This theory is fallacious in several respects. In the first place, its premise that International Law and Municipal Law are two distinct systems is incorrect. In the second place, the second premise that International Law binds States only, whereas Mnnicipal Law applies to individuals is also incorrect for the reasons stated above. In the third place, the theory regards the transformation of treaties into national law for their enforcement. This is not true in all cases for the practice of transforming treaties into national legislation is not uniform in all the countries. And this is certainly not true in the case of law-making treaties. Some treaties are self-operating and do not require transformation.) As regards treaties requiring legislative action for their implementation, it cannot be termed as transformation unless we regard implementation as transformation.) Further, as Kelsen observes, "if a treaty imposes upon a State an obligation which can be fulfilled only by a legislative act, this act is ... no transformation of international into national law undertaken for the purpose of making the application of the treaty possible, but the direct application of the treaty by the competent organ.

Delegation Theory.—According to this theory there is the delegation of a right to every State to decide for itself when the provisions of a treaty or convention are to come into force and in what manner they are to be embodied in State law. There is no need of transformation of a treaty into national law, but the act is merely an extension of one single act. The delegation theory is incomplete for it does not satisfactorily meet the main agreement of the transformation theory. It assumes the primacy of international legal order, but fails to explain the relations existing between municipal and International Law!

## 3. Practice of States with regard to application of International Law in Municipal Sphere

In view of the conflicting theories discussed above the practice of different States with regard to the application of International Law in municipal sphere may now be examined.

Great Britain.—The British practice draws a distinction between the customary rules of International Law and the law laid down by treaties with regard to their operation in municipal sphere. Such rules of customary International Law which are universally recognized and have received the assent of the country are deemed to be part of the law of the land. To this extent the view of the English Judge Blackstone asserting in 1765 that the Law of Nations "is here adopted in its full extent by the common law, and is held to be a part of the Law of the Land" ho'ds good even today. Earlier in 1764 in Triquet v. Bath<sup>2</sup> Lord Mansfield quoting with approval the opinion of Lord

Hans Kelsen: Principles of International Law, p. 352.
 Burr. 1478.

Chancellor Talbot from an earlier case known as Barbuit's case 1 observed "that the law of nations, in its full extent, is and forms part of the law of England.' This statement was affirmed in a number of decisions during the 19th century, e. g., Dolder v. Hunting field3; Wolff v. Oxholm3; and Emperor of Austria v. Day.4 A departure was made from this traditional view in the case of R. v. Keyn (The Franconia) where Chief Justice Cockburn held that English Courts had no jurisdiction over a foreigner for criminal acts done within the three-mile maritime belt of the English coast, and no concurrent assent of nations that a portion of what before was treated as the high sea, and as such common to all the world, shall now be treated as the territory of the local State, can of itself without the authority of Parliament, convert that which before was in the eye of the law high sea into British territory, and so change the law, or give to the Courts of this country, independent of legislation, a jurisdiction over the foreigner where they had it not before. This decision caused the passing of the Territorial Waters Jurisdiction Act, 1878, which English Courts jurisdiction over offences committed in territorial waters.

The traditional view was affirmed in the case of the West Rand Central Gold Mining Co. Ltd. v. The King6 where it was held by Lord Alverstone, C. J. that "whatever had received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called International Law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of International Law may be relevant."

In the well-known case of the Zamora? Lord Parker observed that it was the primary duty and function of a prize court in England to administer International Law; it would certainly be bound by Acts of the Imperial Legislature. But it was nonetheless true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering International Law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court.

It was observed in Commercial Estates Co. v. Board of Trade8 : "International Law as such can confer no rights cognizable in the municipal courts. It is only in so far as the rules of International Law are recognized as included in the rules of the municipal law that they are allowed in the municipal courts to give rise to rights or obligations"

In the case of Compania Naviera Vascongado v. Cristina9 Lord MacMillan observed: "It is manifestly of the highest importance that the Courts of this country before they give the force of law within this realm to any doctrine of International Law should be satisfied that it has the hall-marks of general assent and reciprocity.

Cas. temp. Talbot. 281,
 11 Ves. 283.

<sup>3. 6</sup> M. & S. 92.

<sup>4. 30</sup> Ch. 690.

<sup>5 (1876) 2</sup> Ex D 6; 6. (1905) 2 K B. 391.

<sup>7. (1916) 2</sup> A. C. 77. 8. (1955) 1 K. B. 271, 295.

<sup>9. (1933)</sup> A. C. 485.

In the case of Chung Chi Cheung v. The King, 1 Lord Atkin observed that the courts acknowledged the existence of a body of rules which nations accepted among themselves. On any judicial issue they sought to ascertain what the relevant rule was, and, having found it, they would treat it as incorporated into the domestic law, so far as it was not inconsistent with rules enacted by statutes or finally declared by their tribunals.

(Under the British Constitution an Act of Parliament is supreme. International Law although a part of the Common Law must yield before an Act of Parliament.) In the Scottish case of Mortensen v. Peters2 Lord Dunedin observed: "For us an Act of Parliament is supreme, and we are bound to follow its terms ... It is a trite observation that there is no such thing as a standard of International Law extraneous to the domestic law of a kingdom to which appeal may be made...International Law, so far as this Court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the law of Scotland.

With regard to treatics, which affect the private rights of British subjects or which require the vesting of additional powers in the Grown or impose additional financial obligations upon the British Government, it is recognised that they must receive parliamentary assent for their enforcement. To this extent treaties do not form part of the law of England, unless expressly assented to by the Legislature British courts will also not automatically apply treaties concluded between the Crown and foreign States if they involve any modification of the Common or Statute Law. Such treaties must receive recognition by Parliament. It was observed in the case of A. G. for Canada v. A. G. for Ontario3 that within the British Empire according to the wellestablished rule the making of a treaty is an executive act, and for the performance of its obligations there must be legislative action if they entail alteration of the existing domestic law.

It is clear, therefore, that the doctrine of incorporation implies that "the national law governing matters of international concern is to be derived, in the absence of a controlling statute, executive decision, or judicial precedent, from such relevant principles of the law of nations as can be shown to have received the nation's implied or express assent."

Doctrine of Incorporation .- A study of the British practice, therefore, reveals that the following qualifications are pre-requisities for incorporating the customary international rule or treaty into the domestic law

I. The customary rule must be one generally accepted by the international community, It was observed by Lord MacMillan in Compania Naviera Vascongado v. Cristina already referred to: "It is a recognised pre-requisite to the adoption in our municipal law of a doctrine of Public International Law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative text-books, practice and judicial decisions.

2. The customary international rule must not be inconsistent with statutes or prior judicial decisions.

 <sup>(1939,</sup> A. C. 169.

<sup>2. (19.6) 8</sup> Sessions Cases, 93.

<sup>3. (1937)</sup> A. C. 326

<sup>1.</sup> Dickinson, Op. cit. p. 259.

- 3. Acts of the executive of the State, e.g., declaration of war, cannot be questioned by British Courts, although such acts may be contrary to the established practice of International Law: Crook v, Sprigg.
- 4. Information from the executive on certain matters falling within the Crown's prerogative powers, such as the recognition of States, diplomatic status of persons claiming immunity is conclusive and taking of evidence to establish the same is not permissible: Civil Air Transport Incorporated v. Central Air Transport Corporation<sup>2</sup>; Arantzazu Mendi<sup>3</sup> and Engelke v. Musmann.
- 5. A national court will apply its own version of what the rule of International Law is: Mortensen v. Peters.
- 6. A treaty, though internationally binding, becomes part of the law of the land under the British Constitution when it receives parliamentary assent of its enforcement.

America.—The United States has unambiguously applied the doctrine that "International Law is part of the law of the land." All international conventions ratified by the U. S. A. and such customary International Law as has received the assent of the United States are binding upon American Courts, even if they may be contrary to the statutory provisions. There is a presumption in cases of conflict that the United States Congress did not intend to overrule International Law. There is, therefore, a close similarity between the practice followed by America and Britain in this respect.

It was observed by Mr. Justice Gray in Paquete Habana and the Lola that "International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

To the same effect are the observations of the Supreme Court of the United States in Hilton v. Gruyot<sup>7</sup> that the "International Law in its widest and most comprehensive sense......is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted in their determination...

The Constitution of the United States gives supreme importance to treaties. Article VI of the Constitution of the United States of America specifically provides that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." The result is that as soon as the President ratifies a treaty, it is transformed into American law. If the treaties are self-executing they are binding on the Courts as part of the law of the country. The treaties which, however, require enabling legislation for their enforcement do not become law of the land till they are executed by the necessary legislation.

It was, however, observed in the case of Over the Top (1925): 8

- Svarlien: Introduction to the Law of Nations, p. 65; (1899) A. C. 572.
   (1952) 2 All E. R. 733.
- 3. (1939) A. C. 256. 4. (1928) A. C. 433.
- 14 S L. R. 227.
   U. S. Supreme Court (1900) 175 U. S. 677.

(1895) 159 U. S. 113.
 5 Federal Reporter, 838.

"International practice is law only in so far as we adopt it, and like all common or statute law it bends to the will of Congress."

It is thus clear that the municipal laws making provisions in violation of the principles of International Law are binding on American Courts, such principles of International Law notwithstanding.

The practice of Anglo-American Courts has thus been summed up by Professor Dickinson

"It is the modern Anglo-American doctrine that the national rule on a question of international concern shall be derived, in the absence of a controlling statute, executive decision, or judicial precedent, from relevant principles of International Law to which the nation has given its implied or express consent. The rule thus derived is nonetheless a rule of national law because it is derived from an international source...As it is actually applied therefore the Anglo-American doctrine of incorporation is fundamentally sound."

The doctrine of incorporation, though first formulated as an Anglo-American doctrine, has received approbation of Courts in France, Belgium and Switzerland.

France.—In France the customary rules of International Law are treated as part of the Municipal Law unless they are in conflict with the statute or the constitution of the country. With regard to treaties, there is no uniformity in the decisions of French Courts. Sometimes courts have allowed treaty to prevail over statute law; while often they have taken a contrary view. With regard to the enforcement of treaties the position in France is also fluid. Some treaties require proclamation as laws, while others are simply published.

Spain.—Article 9 of the Spanish Constitution (1931) provides that International Law is part of the law of the land.

Latin American States.—Such States as a rule follow the Anglo-American practice and require the incorporation of the principles of International Law into State laws. Some American States have embodied in their constitution the doctrine that International Law is part of the law of the land.

Norway.—Customary rules of International law are 'treated as part of the law of the land, but treaties to be binding so as to supersede municipal law must receive legislative sanction.

Belgium and Poland.—Customary International Law is treated as part of the law of the land; but the Courts will consider themselves bound by the treaty only when the same has received legislative assent or been transformed into State law. In Belgium and Poland it is essential that treaties should receive the approval of Parliament for their enforcement.

Denmark.—Danish Law also recognises the generally accepted International Law and actions at variance with this are regarded as invalid.

Austria.—Article 8 of the Austrian Constitution recognizes the validity of the recognized rules of International Law, the tendency of the Court being to recognize customary International Law as part of the law of the land.

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Germany.—Article 4 of the Weimar Constitution of Germany (1919) laid down that "the universally recognized rules of International Law are valid as binding constituent parts of German Federal Law." Notwithstanding clear provisions of this article, the German Courts put much too narrow a construction on this article. In 1928 the German Reichsgericht held in the Reparations Levy Case that it was bound to act on the principle lex posterior derogat priori (a later Act overrules an earlier one) and applied a later statute contrary to the provisions of the Treaty of Versailles. In another case the Supreme Court of Germany held in 1933 that as Germany alone, in virtue of her international sovereignty, can decide what belongs to the generally recognized rules of International Law within the meaning of Article 4 of the Constitution, so it lies within her discretion to promulgate legislation conflicting with the provisions of a treaty. In short, during the National Socialist regime there had been a tendency on the part of Courts to apply Article 4 of the Constitution only to such rules as had received the specific consent of Germany

Constitution of India Under Art. 51 of the Indian Constitution it is ac directive principle of State Policy to endeavour to—

- (a) promote international peace and security;
- (b) maintain just and honourable relations between nations;
- (c) foster respect for International Law and treaty obligations in the dealings of organized peoples with one another; and
- (d) encourage settlement of international disputes by arbitration.

Although the Directive Principles of State Policy may not be justiciable under the Indian Constitution its principle is fundamental in the making of laws. The Indian Constitution ensures that in the entire Indian administration high regard shall be given to International Law and also to international morality.

Soviet view. The monistic theoretisations do not find favour with Marxist-Leninist conceptions as to theories of State and law. The 'solidarity' principle figuring prominently in the monistic theories of Duguit and Scelle, which overlooks the fundamental contradictions between bourgeoisie and proletariat, is foreign to Communist theory. It is quite plain that the monistic theory is not an acceptable theory to Communist jurisprudential thought. Judge Krylov asserts that the norms of International Law and those of internal law "coexist" without uniting. He, however, concedes that a significant interplay between International and Municipal Law takes place and is one of the historical means for the progressive development of International Law.

The various sources of the internal law of a State can, however, become sources of International Law, from the moment that they touch the domain of international relations and that they are recognised by other States.

To the same effect are the observations of Vyshinsky: "The principles of Soviet law, reflecting the will of Soviet people and its socialistic concept of law cannot fail to have a decisive influence on every aspect of Soviet foreign policy, on the solution of the problems of foreign policy with the co-operation and, assistance of legal institutions. There cannot be a separation, just as there

Cf. Emanuel Margolis's Article in the International and Comparative Law Quarterly, Jany, 1955, pp. 116, 120.

cannot be a separation between municipal law and International Law in other States."

There are, however, fundamental differences in the nature of the two types with reference to their enforcement. The very standards of International Law, for which, there exists no single legislator, interpreter or organisation guaranteeing their enforcement are characterised by less concreteness and permanence than the standards of internal State Law which is safeguarded by the entire might of the apparatus of State power.1

It is clear from the above that the Soviet view strongly repudiates the subordination of internal law to International Law.

Then, as regards the relationship between the two systems of law, Emanuel Margolis observes that Communist literature, which is extremely sparse, leaves the clear impression that the main bridge between the two rests in the orthodox dualist conception of consensus. The 'will' of the State is clear in the enactment of internal legislation, while it is also expressed in the conclusion of both general and particular treaties and agreements. In the case of customary law, this consent is tacit or implied, and becomes concretised through widespread international practice. In support of the consensus doctrine Korovin observes

"Like any other law, International Law reflects the will of the ruling classes. The reality of International Law, however, is not obviated by the fact that for the time being there are on the international stage bourgeois States, as well as feudal and socialistic ones. Each of them, implementing its own approach and directed by its own motives, may be interested in supporting and preserving a certain portion of generally binding legal norms in international relations.'

Communist writers also seem to express their concurrence with the observations of the Permanent Court of International justice: "Municipal laws are merely facts which express the will and constitute the activities of States",2 and with the views of some of the Judges of the International Court of Justice that "under the regime of the Charter, the rule holds good that the jurisdiction of the International Court of Justice, as of the Permanent Court of International Justice Lefore it, depends on the consent of the States parties to a dispute."3

Soviet viewpoint on the whole accords with the Western theory of "dualism" and "consensualism", consensus being the only possible objective basis of validity between States of divergent political character. International Law is assigned a "co-ordinating" rather than a supreme or pre-eminent character.

Emanuel Morgolis in conclusion observes that Communist jurists find themselves in the position of upholding a traditional and classic point of view developed by the Positivists in the nineteenth and early twentieth centuries. Theirs is, with certain practical and theoretical modifications, an orthodox, dualist-consensual approach. It is somewhat ironic that so highly a revolution-

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D. B. Levin Sov. Gos. i Pravo, No. 9, Septr. 1948, p. 25. 2. Cf. The Case concerning Certain German Interests in Upper Silesia P. C. I. J. Ser. A No. 7, p. 19. 3. Cf The Corfu Channel Case.

ary and tradition-shattering doctrine as Communism should embrace such distinctly "bourgeois" doctrines.

Conclusion. The Permanent Court of International Justice as also the International Court of Justice has consistently maintained that it is a generally accepted principle of International Law that in the relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty: Greco-Bulgarian Communities. 1 Further, decisions of international Courts bear testimony to the fact that municipal law contrary to International Law cannot be pleaded before such Courts "as an excuse for the non-fulfilment by a State of its obligations under International Law". Schwarzenberger thus sums up the principles developed by the Permanent Court of International Justice under six headings :

Firstly, a State is estopped from pleading before the Court that the nonfulfilment of its international obligations or the violation of an international treaty is due to its constitution, or to acts or omissions on the part of its legislative, judicial and administrative organs or of any self-governing body under its control.

Secondly, the provisions of municipal law annot prevail either over the obligations of a State under international customary law, including the minimum standards of International Law, or over its obligations under international treaty law.

Thirdly, a State which has contracted international obligations is bound to make in its municipal law such alterations as may be necessary to ensure the fulfilment of its international obligations.

Fourthly, a violation of International Law does not cease to be so because the State applies the same measures to its own subjects.

Fifthly, the evasive form of a measure under municipal law is irrelevant if, in fact, it amounts to a violation or non-fulfilment of an international obligation.

Sixthly, a measure of a municipal character which enclangers treaty rights of the States is a violation of an international obligation.3

<sup>1. (1</sup>c30) P. C I. J. Ser. B. No. 17, 32.

<sup>2.</sup> G. Schwarzenberger: International Law, Vol. I, pp. 21-22.

# PART II The Law of Peace

## CHAPTER VII

## SUBJECTS OF INTERNATIONAL LAW

'Subjects of the law' are those to whom rules of law are immediately addressed, that is to say, they are directly obligated by the rules of law. Persons to whom law attributes rights and duties are the subjects of law. A subject of International Law is possessed of rights and duties under International Law and can prosecute a claim before an international tribunal where he finds that his rights are being infringed. The objects of the law, on the other hand, are the things necessary to which rights are held and duties imposed.

States are the principal subjects of International Law. They enjoy a locus standi in the law of nations and are the wearers of international personality. In International Law every civilized State is a member of the Family of Nations and is termed in the legal parlance as an International Person. States are the persons to whom the law attributes rights and duties, though it is true they being composite in nature cannot act as a physical unit and have to act through designated agents or public officers.

According to the orthodox positivists, only States are subjects of International Law, and the individual persons are its objects. That implies that with respect to the law of nations, the individual has no legal standing except through his own State. He lacks any juridical personality and cannot vindicate the violation of rules, which right, according to the object theory of the individual, is exclusive with the State.

According to Westlake, on the other hand, "the duties and rights of the States are the duties and rights of men who compose them."

According to Kelsen, "The State is purely a technical legal concept serving to embrace the totality of legal rules applying to a group of persons within a defined territorial area........The subjects of International Law are—like the subjects of national law—individual human beings. States as juristic persons are subjects of International Law in the same way as corporations as juristic persons are subjects of International Law. The statement that States as juristic persons are subjects of International Law does not mean that individuals are not the subjects of the obligations, responsibilities and rights established by that law. It only means that individual human beings are indirectly and collectively, in their capacity as organs or members of the State, subjects of the obligations, responsibilities and rights presented as obligations, responsibilities and rights of the State. Besides, human beings are also directly and individually subjects of obligations, responsibilities and rights established by International Law."

"The Nuremberg Tribunal made the following observation regarding the position of the individual in International Law:

"That International Law imposes duties and liabilities upon individuals as well as upon States has long been recognised.....Individuals can be punished for violations of International Law. Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced."

According to Lawrence, "all authorities agree that sovereign States are subjects of International Law." But there is difference of opinion as to whether they are the only subjects. He holds that, while they are by far the most important, they do not stand alone. Individuals must possess the power of directing their own actions and controlling their own lives before they can received into an ordinary society or club. In the same way a state must be able to determine its own destinies before it can be accounted a member of the society of nations. If its corporate action is settled for it by some external authority, other states will be obliged to deal with that authority. observes that just as a minor, who has partial, but not full control of his affairs is sometimes permitted to join a society in a lower grade of membership, so when the domestic government of a state deals with some of its international affairs, while an external authority answers for it in others, it is impossible to regard that State as outside the family of nations entirely, while at the same time it is evident that its membership is not complete. concludes, therefore, that there are grades and degrees among the subjects of International Law. Besides sovereign states, part sovereign states and civilized belligerent communities not being states are also subjects of International Law. With regard to corporations and individuals, Professor Lawrence entertains grave doubts.

The orthodox positivists' view that only States can be subjects of International Law became with the advent of the 20th century more and more obsolete. The individual person came to be regarded after the First World War not only as an object, but as "the final end, a beneficiary, and a potential subject of International Law." The Genocide Convention adopted by the General Assembly of the United Nations in December, 1948, provided that persons committing the acts of genocide must be punished whether they are constitutionally responsible rulers, public officials or private individuals.

The traditional view that the individual is not a subject of International Law but only an object and International Law affects him only through the medium of the States, has undergone considerable changes. As a result of the modern developments in International Law and the Charter of the United Nations the individual has acquired status and a stature transforming him from "an object of international compassion into a subject of international right." By recognising fundamental rights of the individual, independent of the law of the State, and imposing obligations or conferring rights directly upon him, the Charter of the United Nations and the various other law-making treaties have brought about a new phase towards the recognition of the rights of the individual so as to constitute him a subject of the law of nations.

To sum up the position in the words of Schwarzenberger: "The original subjects of International Law are sovereign States, that is to say, independent territorial groups which exist side by side in a highly dynamic—and frequently disturbed—equilibrium. They are strong enough to resist interference by other groups in what they consider to be their exclusively domestic affairs. As a rule, they are also prepared to treat on a footing of equality those whom they themselves are not strong enough to reduce to a state of subjection. Thus, historically speaking, it is true to say that sovereign States are the normal type of subjects of International Law. It is equally true that, in the future development of International Law, these two conditions will have to be fulfilled if a new territorial group should claim to be admitted to the chosen circle of

<sup>1.</sup> George Manner. The Object Theory of the Individual in International Law, American Journal of International Law Vol. 46 (1952), p. 433.

the existing subjects of International Law. Nonetheless, it is a mistake to deduce from this state of affairs that sovereign States alone are eligible to be subjects of International Law. This is a matter within the discretion of each of the existing subjects af International Law. States which are members of an international institution may agree to treat such an international institution as a subject of International Law for limited -purposes. Non-members, however, may choose completely to ignore the existence of an international institution, as happened in the case of the League of Nations. Equally States may recognise a dependent State as a subject of International Law."

According to Starke, international practice has in recent years extended the range of subjects far beyond that of States only, and he cites instances to illustrate that international institutions and organs, such as the United Nations and the International Labour Organization, have been established under International Conventions containing constitutional provisions regulating their duties and functions and even within the United Nations and the International Labour Organization, for example, are other organs, and even individuals (e. g., the Secretary-General of the United Nations), whose activities are regulated by rules set out in these constitutional instruments. Then several 'law-making' Conventions have been concluded in regard to matters of international criminal law, for example, the Geneva Conventions dealing with the Suppression of Counterfeiting Currency (1929) and with the Suppression of the International Drug Traffic (1936). Under these Conventions, States have concerted their action for the punishment of certain international offences or crimes in which individuals alone were concerned. Further, under treaties concerning national minorities, individuals were given the right of securing redress by application to an international Court (Arts. 297 and 304 of the Treaty of Versailles). Again, insurgents as a group may be granted belligerent rights in a contest with the legitimate Government, although not in any sense organised as a State.

Starke while summing up his conclusions observes :

"These and other developments of recent years appear to show that the theory that States are the exclusive subjects of International Law cannot be accepted today as accurate in all respects, although it may be a good working generalisation for the practical international lawyer. The use of the State as a medium and screen for the application of International Law, which was apt for the system of International law as it existed in the eighteenth and nineteenth centuries, cannot now do justice to all the far-reaching aims of the modern system.

"Yet it is wrong to minimise this traditional theory as artificially to explain away the developments that have subjected the theory to such strain. The bulk of International Law consists of rules which bind States, and it is only in the minority of cases, although it is a substantial minority, that lawyers have to concern themselves with individuals and non-State entities as subjects of International Law."<sup>2</sup>

This topic has been discussed in another chapter "Place of the individual in International Law" in greater detail and may be studied there.

See post, Chapter XXV.

Schwarzenberger: A Manual of International Law, 2nd Ed., p. 25.
 Starke An Introduction to International Law 7th Ed., p. 75.

## CHAPTER VIII

## STATES IN GENERAL

Definition of State. A State has been defined in various ways according to the manner of thinking of the writers concerned. It will be useful to study here those definitions in order to have a clear idea of the characteristics of a State.

Lawrence defines a State as a political community, the members of which are bound together by the tie of common subjection to some central authority, whose commands the bulk of them habitually obey.1

According to Salmond, a State is a society of men established for the maintenance of order and justice within a determined territory by way of force. 2

A State is a numerous assemblage of human beings organized for law, generally occupying a certain territory. To quote the language of Holland, a 'State' is a numerous assemblage of human beings, generally occupying a certain territory, amongst whom the will of the majority, or of an ascertainable class of persons, is by the strength of such a majority, or class, made to prevail against any of their number who oppose it.3

According to Holland the five characteristics of a State are a number of persons, a political organisation so permanent as to secure the habitual obedience of citizens, a defined territory, independence, and a level of civilization procuring its admission into the Family of Nations.

Pitt Cobbett describes a State for purposes of international law as a people permanently occupying a fixed territory; bound together into one body politic by common subjection to some definite sovereign authority; exercising through the medium of an organized government, a control over all persons and things within its territory; and above all capable of maintaining relations of peace and war with other communities.4

As understood in International Law, a State is a permanently organised political society, occupying a fixed territory, and enjoying within the borders of that territory freedom from control by any other State, so that it is able to be a free agent before the world.5

According to Oppenheim, a State proper-in contradistinction to colonics—is in existence when the people is settled in a country under its own sovereign Government. The conditions which must obtain for the existence of a State are four :

There must, first, be a people. A people is an aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds, or be of different colour.

There must, secondly, be a country in which the people have settled down. A wandering people is not a State.

 T. J. Lawrence: The Principles of International Law, 7th Ed., p. 48. Op cit. Salmond on Jurisprudence, pp. 129-130.

3. Sir Thomas Erskine Holland: The Elements of Jurisprudence, 13th Ed., p. 46. 4. Pitt Cobbett's Leading Cases on International Law, Vol. I, 5th Ed., p. 39.

5 Charles G. Fenwick: International Law, 3rd Ed., p. 104.

There must, thirdly, be a Government—that is, one or more persons who are the representatives of the people and rule according to the law of the land. An anarchistic community is not a Scate.

There must, lastly, be a sovereign Government. Sovereignty is supreme authority, an authority which is independent of any other earthly authority.1

Sir Cecil Hurst defines a State as an organised political entity, exercising sway over a certain area of territory and over its inhabitants and over all the men and women who may be bound to it by the tie of nationality. Apart from the self-imposed limitations, each State is master in its own household.

A State is a body of free persons, united together for the common benefit, to enjoy peaceably what is their own and to do justice to others.2

Article 1 of the Montevideo Convention of 1933 on the Rights and Duties of States (signed by the United States and certain Latin American countries) enumerates the following characteristics of the State as a person of International Law:

(a) a permanent population; (b) a defined territory; (c) a Government; and (d) a capacity to enter into relations with other States.

It is necessary that "a State must have recognised capacity to maintain external relations with other States. This distinguishes States proper from lesser units such as members of a Federation, or Protectorates, which do not manage their own foreign affairs, and are not recognized by other States as fully-fledged members of the international community."

Rights of a State.—A State possesses certain rights—which are often termed as fundamental—, these being the right of self-preservation, the right to equality, the right to independence, the right to respect or dignity and the right to territory. The right of self-preservation is supreme, and even the violation of a rule of International Law is justified if the circumstances so warrant. As regards a state's right to respect or dignity, it is, as observed by Oppenheim, a quality recognized by other States, and adheres to a State from the moment of its recognition till the moment of its extinction, whatever behaviour it displays.

Sovereignty and Independence of States.—Sovereignty is a legal term signifying the supreme power by which any State is governed. It denotes in ordinary parlance the unrestricted power of self-determination by the individual State of its external and domestic affairs. Austin termed sovereignty as essential, indivisible and illimitable. As a result of the exercise of sovereignty, there emerge two legal assumptions in the domain of International Law, viz, the independence and equality before the law of each sovereign State and the prohibition to interfere with the external and internal sovereignty of each independent State, "External sovereignty is independent of control from without; internal sovereignty is paramount power over all action within". (Holland).

The doctrine of independence of a state implies that it is free to adopt any constitution it likes, is free to deal with its own citizens, either inside or outside its territories, and aliens within its territory, in any manner and is at liberty to shape its foreign policy, join any bloc or adopt a neutral attitude, conclude treaties with other States or make war or peace accordingly as it suits its interests, without any intervention by other nations. It is freedom from outside interference which constitutes a State's independence.

1. Oppenheim: International Law, Vol. I. pp. 118-119.

The U. S Supreme Court in Chisholm v. Georgia, 2 Dallas, 456.
 J. G. Starke: An Introduction to International Law, 5th Ed., 89.

The traditional concept of sovereignty has undergone revolutionary changes. It is one of the prerogatives of a sovereign State to enter into treaties with other States for their mutual benefit and common interest. But the conclusion of treaties of unequal alliance or guarantee in a sense limits the exercise of the sovereignty by the imposition of unilateral burden on the weaker party. The establishment of the United Nations, although based on the principle of the sovereign equality of all its members, has shifted the emphasis from independence to interdependence of States. All the signatories to the U. N. Charter have united their strength to maintain international peace and security and to employ international machinery for the promotion of the economic and social advancement of all peoples.

The very idea of independent States being bound by International Law in their conduct towards each other, irrespective of their municipal legislation, militates against their unrestricted sovereignty. And, as Oppenheim observes.: "It is being increasingly realised that progress in International Law, the maintenance of international peace and, with it, of independent national States, are in the long run conditioned by a partial surrender of their sovereignty so as to render possible, within a limited sphere, the process of international legislation and within a necessarily unlimited sphere, the securing of the rule of law as ascertained by international tribunals, endowed with obligatory jurisdiction".1

"At the present time there is hardly a State which, in the interests of the international community, has not accepted restrictions on its liberty of action. Thus most States are members of the United Nations and the International Labour Organisation (I. L. O.), in relation to which they have undertaken obligations limiting their unfettered discretion in matters of international policy. Therefore, it is probably more accurate today to say that the sovereignty of a State means the residuum of power which it possesses within the confines laid down by International Law."

The division of the world in the past into two powerful blocs, one led by the United States and the other by the Union of Soviet Socialist Republics, commonly spoken of as the cold war,—but more recently with the collapse of of the frontiers of the cold war and development of international relations into a two tier character constituting at the apex the tier of the major powers and in the second tier the smaller powers left largely, to their own resources, steeped into divisive issues and conflicts—have led to the withering away of State individualities and to the development of mutual economic, military and political co-operation within each of the blocs of the West and the East, or the respective spheres of influence of the major powers, each striving to expand the area of its influence.

Case Law on Sovereignty and Independence.—The law of nations being part of the common law of England and being the medium of commerce, a foreign sovereign at peace with the Crown of England, suing in an English Court to protect his prerogative right of issuing coin or paper money, will have his right protected from invasion: The Emperor of Austria v. Day and Kossuth.<sup>3</sup> A foreign sovereign may sue in England for a wrong done to him by an English subject, unauthorised by the English Government, in respect of property belonging to that foreign sovereign, either in his individual or his corporate capacity, or to his subjects. (ibid.<sup>4</sup>

4. I B. I. L. C., 45.

<sup>1.</sup> Oppenheim - International Law, Vol. I, 8th Ed. p. 123.

Starke: An Introduction to International Law, 5th Ed., p. 91.
 (1861) 2 Giff. 628: 1 B. I. L. C., 22.

But if an independent foreign sovereign seeks to enforce the performance of a commercial contract in the English Courts, he will be liable to give security for costs: Otho, King of Greece v. Wright<sup>1</sup>; The Emperor of Brazil v. Robinson & Others<sup>2</sup> A foreign prince who comes voluntarily as a suitor into a court of law in England, becomes a subject, as to all matters connected with that suit, to the jurisdiction of a court of equity: Rothschild v. Queen of Portugal.<sup>3</sup>

There is, however, a well-recognised rule under which the English Courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States; and this is one of those actions which those Courts will not entertain. The English Courts will, therefore, not entertain an action by a sovereign foreign State suing in England on a claim for revenue due from one of its own subjects: H. M. The Queen of England v. Drukker.

Equality of States.—States, although unequal in size, population, power, degree of civilization, wealth and other qualities, are nevertheless equals as International Persons in the Family of Nations. This legal equality, Oppenheim observes, has four important consequences.

The first is that, whenever a question arises which has to be settled by consent every State has a right to one vote only.

The second consequence is that legally—although not politically—the vote of the weakest and smallest State has as much weight as the vote of the largest and most powerful.

The third consequence of State equality is that no State can claim jurisdiction over another. Therefore, although States can sue in foreign courts, they cannot as a rule be sued there, unless they voluntarily submit to the jurisdiction of the foreign court concerned. (Mighell v. Sultan of Johore<sup>5</sup>, The Parlement Belge<sup>6</sup> and Duff Development Co., Ltd. v. Government of Kelantan<sup>7</sup>).

The fourth consequence of equality of States is that the Courts of one State do not, as a rule, question the validity or legality of the official acts of another sovereign State or the official or officially avowed acts of its agents, at any rate in so far as those acts purport to take effect within the sphere of the latter State's own jurisdiction.8

Although in theory States enjoy equal rights, and have one vote each nevertheless in actual operation it is the votes of the big powers that ultimately count. It is they who swing the balance. Passions and prejudices on the part of the great powers have done more to mar the prospects of peace than the universal desire for peace shared by the overwhelming majority of mankind. Under the Covenant of the League of Nations the great powers enjoyed a legal superiority over the smaller States. The glaring inequality of the States in actual practice is also apparent from the fact that the Big Five, viz., the United States of America, are permanent members of the Security Council and possess rights of vetoing any decision of the Security Council in matters

 <sup>(1837) 6</sup> Dowl 13; 1 B I. L. C. 123.

<sup>2 (1837-8&#</sup>x27; 5 Dowl. 522 : 1 B. I. L. C. 127. 3. (1839) 3 Y. & C. Ex. 594 : 1 B. I. L. G. 128. 4. (1928) I Ch. 877.

<sup>5. (1893)</sup> I. Q B. 149. 6 (1880) 5 P. D. 197. 7. (1924) A. C. 797.

Oppenheim: International Law, Vol. 1, 8th Ed. pp. 263-267.

LA HILLHAM NDEPENDENT STATES

of substauce. This power of veto has, however, been circumscribed by the new machinery adopted by the General Assembly whereby it has the power to take positive action against aggression on which the Security Council is unable to act because of the 'veto'. Again, it was the influence of the United States of America, one of the most powerful members of the U. N., which for long prevented the entry in the U. N. of the rightful Government of China. The People's Republic of China was, however, admitted to the United Nations in October 1971, and she exercised her veto in the Security Council in August 1972 to block the admission of Bangladesh to the United Nations, which has kept up tensions in South-East Asia.

Apart from what has been said above, the inequality of States is further evidenced by the fact that the diplomatic envoys of certain powers, i. e., the United States, Great Britain and France are designated as Ambassadors, while those of lesser powers, e. g., Switzerland, are ranked as Ministers only.

According to Sir Cecil Hurst, literally nothing could be further from the truth than the idea that all States are equal. One has only to look around the world to see that in respect of the size of their territory, the numbers of their population, their material resources and the degree of prosperity to which they have attained, States are most unequal. It is only in respect of this right to manage their own affairs that all States are equal—a principle that may be adequately summarised as equality before the law.

To quote Fenwick, "The contradiction between legal principles and hard facts was so manifest that realists before 1914 readily drew the conclusion that the whole business of equality was a legal paradox."

According to Svarlien, in spite of assertions to the contrary, States are unequal by all conceivable tests which can be applied: They are unequal not only in size, population, resources, state of the arts, and in power, but it would be at variance with the facts even to contend that they are always equal in legal rights. States have certain legal rights with reference to other international persons and the community of nations as a whole. But it would be incorrect to assume that those rights are equal. Nevertheless all States are entitled to equal protection of whatever legal rights they possess. Thus, the weakness of a State cannot serve as an excuse in law for the denial of such rights.<sup>2</sup>

Classification of States — For the purposes of International Law States may be divided into two parts; (1) full sovereign or independent States and (2) not full sovereign or dependent States. They are, in other words, perfect and imperfect international persons.

Independent States.—Independent States are fully sovereign members of the Family of Nations. They are termed in International Law as sovereign States. They are the normal type of subjects of International Law, and exercise undivided authority over all persons and property within their borders and are independent of direct control by any other power. Sovereign States are by international usage entitled to certain privileges and immunities. They are entitled to the privilege of sending diplomatic ministers to other States and of receiving representatives from them in return. They conclude in their own names treaties with other States. They meet at international conferences on the basis of perfect equality. In short, there is no third party

Sir Cecil Hurst: International Law. The Collected Papers, pp. 5-6.
 Svarlien: Introduction to the Law of Nations, pp. 84-85.

to intermeddle in their relations with other States. "Independence means freedom from control, and a State like United Kingdom or France is independent because it is free from all control either over its internal Government or over its foreign relations."

Dependent States.—The idea of dependence necessarily implies a relation between a superior State (suzerain, protector, etc.) and an inferior or subject State (vassal, protege, etc.); the relation between the State which can legally impose its will and the State which is legally compelled to submit to that will. Where there is no such relation of superiority and subordination, it is impossible to speak of dependence within the meaning of International Law: Austrian-German Customs Union.<sup>2</sup>

Dependent States undoubtedly have only a limited capacity for foreign relations and are imperfect subjects of International Law. Their exact position can only be determined by reference to treaties and to the extent their subordinate position has been recognised by other States. In other words, they are subjects of International Law within the range of their self-government. The outside control, although impairing the independence of the State, does not preclude it from membership of the Family of Nations, for, as Westlake observes, "it is not necessary for a State to be independent in order to be a State of International Law." Such dependent States do enjoy many rights and fulfil obligations of international persons. They send representatives abroad, and their monarchs receive the courtesies and enjoy immunities which, according to International Law, are accorded to sovereigns or their accredited representatives.

Statehood alone does not imply membership of the Family of Nations and the lack of such a qualification does not necessarily place a State outside the sphere of International Law. The essential characteristics of a State have been discussed at the very outset. To recapitulate them, there must be a permanent population, a defined territory, a Government and a capacity to enter into relations with other States. Besides these, the State, represented by a Government, must receive a de facto allegiance from its subjects; it must exhibit reasonable promise of durability; it must have its own military and naval forces; and it must possess a separate flag which is the main symbol of freedom. Above all these, Oppenheim emphasizes that a State is, and becomes, an International Person through recognition only and exclusively. This proposition has been discussed in a subsequent chapter.

Composite Communities.—Having discussed the main characteristics of sovereign States, we now pass on to a certain special class of States, which, although not fully sovereign, are yet possessed of many characteristics of an International Person.

A State is generally a single International Person where there is one central political authority as government representing the State. In addition there may be composite International Persons.

Sovereign States permanently united together by a federal compact may either assume the form of a confederation or a supreme federal Government, often termed as a composite State. There are two kinds of composite International Persons, viz., Real Unions and Federal States. In contradistinction to Real Unions and Federal States, observes Oppenheim, a so-called Personal Union and a Union of so-called Confederated States are not International Persons.

<sup>1.</sup> Westlake: International Law, Vol. 1 (2nd Ed.), p. 20.

A. B. 41 57.
 See post, Chap. X.

Real Union.—A "real union" is in existence when two or more sovereign States have, by an international treaty, the same monarch and for international purposes and external relations act as one State although the constituent elements retain their separateness in domestic matter. A real union is not itself a State, but merely a union of two full sovereign States, which together make one single but composite International Person. At persent there is no real union in existence. The real union of Austria-Hungary formed in 1867 was dissolved under stress of defeating war in 1918. The union between Denmark and Iceland also came to an end in 1944. Another example of it is Norway and Sweden between 1814 and 1905.

Personal Union.—A personal union is in existence when two sovereign States and separate international persons are linked together through accidental fact that they have the same individual as monarch. These States retain their separate identities for external purposes. Such a personal union existed from 1714 to 1837 between Great Britain and Hanover, from 1815 to 1890 between the Netherlands and Luxemburg and from 1885 to 1908 between Belgium and the Congo Free State. A Personal Union is not an International Person, the two sovereign member-States retaining their separate in ternational entities.

Confederation.-A confederation or staatenbund is constituted by a number of full sovereign States linking together by an international treaty into a union with organs of Government extending over the member-States but not over the subjects of those States. They unite by means of a compact for the purposes of mutual co-operation or defence, each constituent member retaining its sovereignty and separate identity. Such a confederation is not a State. It is more or less a society of an international character and the member-States remain full sovereign States and maintain their international position. Each confederating State retains the power to revoke the treaty which has united them. The organs of the confederation fall short of being legislative and governmental. A confederation has not proved a success, and the three important unions of confederated States of modern times, viz., the U. S. A., the German and the Swiss Confederation turned into unions of federal States. Examples of confederation are provided by the Netherlands from 1580 to 1795, the United States of America from 1778 to 1787, Switzerland from 1291 to 1798 and from 1815 to 1848 and Germany from 1815 to 1866. Confederated States do not exist at the present time.

Federal State.—A Federal State or Bundesstaat is a perpetual union of several sovereign States which has organs of its own and is invested with power, not only over the member-States, but also over their citizens.\footnote{1} "A Bundesstaat" observes Lawrence, "comprises those unions in which the central authority alone can deal with foreign powers and settle external affairs, the various members having control over the internal affairs only." The ordinary powers of sovereignty are partly vested in the federal government and partly in the separate States, both the authorities being co-ordinate within their respective sphere. It is a real and sovereign State within the sphere of the powers granted to it and has unlike a confederation direct power not only over the member States but also over the citizens of those States. Sovereignty, as said above, is divided between member-States and the Federal State. The Federal State has the power to declare war, make peace or conclude treaties and the member-States exercise power and control within their competence and retain a considerable measure of autonomy. Oppenheim observes that

<sup>1.</sup> Oppenheim: International Law, Vol. I p. 175.

member-States of a federal State can be International Persons in a degree. They are not full subjects of International Law. Their position, if any, within the circle is overshadowed by their federal State; they are part sovereign States, and they are, consequently, international persons for some purposes only.

The principal Federal States in existence are the United States of America since 1787, Switzerland since 1848, Mexico, Argentina, Canada, Brazil, Venezuela, Australia, the Union of Soviet Socialist Republics, Federal Republic of Germany India, Pakistan and Indonesia since 1949.

The Indian Constitution is federal in all its general features, although it permits the federal government, viz., the Union Government at the centre, to convert itself into a unitary one in times of emergency by the issue of a proclamation by the President under Article 352.

Condominium.—It is a common rule of two or more States in a territory. In it although there is a joint sovereignty over the population, each of the jointly governing States has separate jurisdiction over its own respective subjects. The Anglo-Egyptian Sudan, the Phoenix Islands in the South Seas under the common Anglo-American administration and the New Hebrides under the common Anglo-French administration furnish examples of a condominium. In 1939 the islands of Canton and Edenbury were placed under the joint control of Great Britain and the United States for a period of 50 years.

## Vassal States and Protectorates

Vassal State.—A vassal State is one which is completely under the suzerainty of another State. It has no position in International Law. The suzerain absorbs all the functions to the vassal state. A vassal has no right of declaring war nor of making alliances with foreign powers, for these acts impair its allegiance to the suzerain. According to Hall, "a State under the suzerainty of another being confessedly part of another State has those rights only which have been expressly granted to it and the assumption of larger powers of external action than those which have been distinctly conceded to it is an act of rebellion against the sovereign."

There are, however, instances where vassal states have maintained certain international relations, and in such cases they have a limited international personality. The examples of vassal states are Rumania and Serbia before 1878; Bulgaria between 1878 and 1901, Egypt till October 1951 when she abrogated the 1936-Treaty by ending the privileges enjoyed by the British troops in the Suez Cand, The Transvaal, the Orange Free State, Tibet and Outer Mongolia.

Tibet.—Tibet is bordered on north and east by China proper and on south by India. She was politically independent of China until 1720 when the Manchu Emperor Kang Hsi taking advantage of the dispute between the Mongols and the Tibetans over the succession to the sixth Dalai Lama despatched an army to Tibet and established Chinese rule at Lhasa. With the end of the Moghul rule in China the Chinese suzerainty over 1 ibet disappeared. Subsequently a special relationship was established in 1904 between the British Government in India and Tibet as a result of a convention of that year sovereignty of Tibet. There was no mention of any Chinese suzerainty over Tibet in this convention. In 1906 Tibet was placed under the double

<sup>1.</sup> W. E. Hall: A Treatise on International Law, (4th Ed.), p. 31.

suzerainty of Britain and China. Then China invaded Tibet in 1911 and established a military occupation when the 13th Dalai Lama took refuge in Ingia. But Tibet terminated Chinese suzerainty in 1912 when she declared herself independent.

India's relationship with Tibet thus remained fluid for several decades till a conference was held in 1914 at Simla under the presidency of Sir Henry McMahon at which the well known Simla Convention was drafted. The Convention recognised the autonomy of Tibet under Chinese authority. The British Agent and political officer in Sikkim conducted on behalf of the Government of India relations with Tibet. But in 1936 India established direct contact with the Tibetan Government in view of the developments in China and Tibet, with Chinese suzerainty continuing more in theory than in practice.

In 1949 China decided to have full control over tibet and with that end in view military forces were sent to Tibet on the establishment of the Communist regime in China. This led the Dalai Lama to make a petition to the U. N. protesting against the unwarranted Communist interference. That did not however succeed.

In 1950 when the Peking Government of Red China wanted to occupy Tibet, India maintained that she never accepted the sovereignty of China over Tibet, but recognised nominal Chinese suzerainty subject to the autonomy of Tibet.

The Sino-Tibetan treaty (17-point agreement) was signed in Peking on the 23rd May, 1951, which provided for the establishment of a Chinese military and administrative commission and military area headquarters in Tibet and laid down that the Central People's Government of China shall have the centralised handling of all external affairs of the area of Tibet. It guaranteed internal autonomy to Tibet and a suzerainty to China. Peking agreed to maintain the position of the Dalai Lama as the supreme spiritual and temporal ruler of Tibet.

This treaty was thrust upon Tibet as a measure of security for China's own existence on the occasion of the allied troops crossing the 38th parallel in Korea and their progress at the border of Manchuria.

The 1951-agreement with China did not prevent the Communist ideology from coming into clash with the ancient religious ideology of Tibetans under the Dalai Lama.

On June 28, 1954, the Prime Ministers of India and China affirmed the Panch Sheel principles to govern the relations between the two countries.

In the middle of March, 1959, fighting flared up and swirled through the streets of Tibet's capital city Lhasa, and widespread demonstrations were made against the Chinese regime. The revolt soon spread to all the corners of Tibet, and the Tibetan cabinet denounced the 1951-treaty and proclaimed Tibet to be independent. On March 31, the spiritual and temporal head of Tibet, the Dalai Lama, crossed into Indian territory and the Prime Minister of India announced that the Government of India had decided to grant him political asylum. The Government of India's decision to accord asylum to the Dalai Lama in India was also conveyed to China. 12

China has no reason to claim Tibet for the Himalayan region never belonged to her.

Grant of Asylum.—As regards the question of the asylum granted to the Dalai Lama, it is in consonance with the inalienable right of a State to afford asylum to political refugees. International Law, however, requires that the person to whom asylum is given must refrain from engaging in activities directed against the country from which he has fled while enjoying the asylum. India has, therefore, acted within her rights in affording asylum to the Dalai Lama and China cannot take any objection against the act which is fully permissible under the International Law, nor should it be regarded as an unfriendly act against any country.

Nepal.—Nepal was reduced to the status of a vassal after the treaty of 1815 between the British Government and Nepal under which the external affairs of Nepal were transferred to the British Government. The treaty of 1835 between Nepal and the East India Company even forbode the Nepal Government to have any intercourse with Indian princes. After the First World War the British Government recognized the independence of Nepal by confering on her the right of legation in foreign countries. She now possesses the right of a fully sovereign State and has treaty relations with India and Tibet.

Indian States.—Under the British rule the Indian States were mere vassal States under the suzerainty of His Majesty the King of England. They exercised internal sovereignty only. With the passing of the Indian Independence Act, 1947, the suzerainty of the Crown lapsed over the Indian States, and it was a difficult task for the Government of India to integrate no fewer than 550 territorial units into sizeable units under a common system of law and government. The State Department, with the late Sardar Vallabhbhai Patel as its head, achieved complete success by merging some States into adjoining provinces, by grouping other States into union of States and by taking over a few States to be administered centrally, the instrument of accession having been executed by the rulers of the States. Such 'States' lost their separate identity and are a part of the Indian Union.

In the case of Kashmir, however, a difficult situation arose. The Govern ment of Kashmir entered into a standstill agreement with Pakistan for the continuance of economic and administrative relations as also communications, supplies and post office and telegraph arrangements on the same basis as existed before the partition of India. Pakistan, however, shortly after began to put economic pressure on Kashmir which grew into a blockade against the State followed by a mass invasion of tribal people. On the 27th October, 1947, on a request made by the Maharaja of Kashmir, the Government of India accepted the accession of Jammu and Kashmir; but the Prime Minister of India declared that the accession was subject to the proviso that a plebiscite of the people would be held in the State when the law and order situation allowed. It is to be noted that the declaration by the Prime Minister of India about the plebiscite was made after the acceptance of the accession, the accession not being subject to that condition and that this pledge was given unilaterally. In spite of the accession of the State to India, the raiders continued their operations from bases in Pakistan. On the 30th December, 1947, the Government of India brought the dispute before the Security Council, which has been hanging fire since then.

On May, 11, 1954, the President of India issued an Order under Article 370 of the Constitution of India implementing the decisions of the Jammu and Kashmir State Constituent Assembly on the constitutional relationship between the State and the Indian Union. Under the Order the provisions

relating to citizenship and fundamental rights, the legislative, executive and judicial organs of the Union and their powers, relations between the Union and the State, finance, trade, commerce and intercourse within the Union as found in Parts 1 to 3, 5 and 11 to 22 of the Constitution have been made applicable to Jammu and Kashmir. The Supreme Court of India will exercise practically the same jurisdiction in Jammu and Kashmir as in other parts of the country.

The State of Jammu and Kashmir is part and parcel of the Indian Union. It forms part of the Indian Union and has delegated its three subjects, viz., Defence, Foreign Affairs and Communications to the Indian Union. For other subjects it has full autonomy.

Protectorate.—In the case of a protectorate, a weak State socks the protection of a strong State by the conclusion of a treaty, with the result that the important international business is left to the protecting State. The protecting State exercises a varying measure of control over the external relations and sometimes over internal affairs, of the weak State depending upon the provisions of the treaty. Oppenheim calls the relationship a kind of international guardianship.

A State deprived of the possibility of conducting its own foreign relations, cut off from contact with its sister nations and almost necessarily incorporated (internationally speaking) in the protecting State represents a denaturalised conception of a protected State. A protected State is, in fact, not a State at all.<sup>1</sup>

It was observed by Lord Haldane in Sobhzva II v. Miller<sup>2</sup> that in the general case of a British protectorate, although the protected country is not a British dominion, its foreign relations are under the exclusive control of the Crown, so that its Government cannot hold direct communication with any other foreign power nor a foreign power with its Government. The protected State becomes only semi-sovereign, for the protector may have to interfere, at least to a limited extent, with its administration in order to fulfil the obligations which International Law imposes on him to protect within it the subjects of foreign powers.

<sup>1.</sup> T. Baty: 'Protectorates and Mandates', The British Year Book of International Law (1921-1922), pp. 114-115

 <sup>(1926) \.</sup> C. 518.
 Annual Digest (1920-1930), Case No. 11.

As regards the extent of the powers of a protecting State in the territory of a protected State the Permanent Gourt of International Justice observed in the case of Tunis-Morocco Nationality Decrees¹ that it depends, first, upon the treaties between the protecting State and the protected State establishing the Protectorate, and, secondly, upon the conditions under which the Protectorate has been recognized by third Powers as against whom there is an intention to rely on the provisions of these Treaties. The position in the various protected States must be ascertained in each case by reference to the relevant agreement. In spite of common features possessed by Protectorates under International Law, they have individual legal characteristics resulting from the special conditions under which they created, and the stage of their development.

It was observed in the *Ionian Ships*<sup>2</sup> that the status of the Ionian Islands, and their relation to Great Britain, are regulated exclusively by the Treaty of Paris of November 5, 1918. That constitutes them a free and independent State, under the exclusive protection of Great Britain. The protecting sovereign has the right of making peace or war for them. But the intention to place them in a state of war must be clearly expressed, as they do not become so ex necessitate from Great Britain being at war. Great Britain has not declared war for them against Russia. Their trade, therefore, with Russia is not illegal, because they are neither British subjects nor allies in the war, nor enemies of Russia.

Authority over foreign subjects is appropriated independently of consent on the part of other European states. It rests upon the implied assertion that exercise of jurisdiction on all persons within a protected territory is so necessary, or at least so natural, a consequence of the protectorate where native administration and juridical organisation is inadequate, that foreign powers may be expected to acquiesce in its enforcement in the same manner as they acquiesce in the effects of complete sovereignty.<sup>3</sup>

In Ex parte Muenya, the Court of Appeal setting aside the view of the Divisional Court that because Northern Rhodesia is a protectorate therefore as a matter of course and of principle it followed that the Court of Queen's Bench had no power or jurisdiction to make an order of habeas corpus in the case of a British subject in that country who was unlawfully or arbitrarily detained there, held that the jurisdiction ought not to be limited to territories, outside England, which were strictly labelled 'colonies or foreign dominions', but would extend to territories which, having regard to the extent of the dominion in fact exercised, can be said to be under the subjection of the Crown and in which the issue of a writ will be regarded as "proper and efficient."

Sikkim,—Sikkim, which is a small State embedded in the Himalayas lying between India and Tibet, was brought under the direct control of the Government of India in 1905 and she continued to be a British protectorate since then.

On December 5, 1950, the Government of India entered into a treaty with Sikkim whereby the latter would continue as a protectorate of India, enjoying autonomy in regard to internal affairs excepting defence, external affairs and communication. India is responsible for the defence of territorial integrity of Sikkim. The Sikkim Government has placed a limitation upon

<sup>1.</sup> P. C. I. J. Advisory Opinion, Ser. B. No 4.

 <sup>(1855) 2</sup> Sp. Ecc. & Adm. 212.
 W. E. Hall: Powers and Foreign Jurisdiction of the British Crown.
 (1960) 1 Q. B. 241.

itself by agreeing to refrain from importing arms, ammunitions or any war materials from any State without the Indian Government's express consent and approval. Its external relations are controlled by the Indian Government. In April 1973 on the request of the head of the State of Sikkim, the Chogyal of Sikkim, India sent her army to take over control of Gangtok with a view to restoring law and order in the Kingdom.

Sikkim has its own legislative body. There is an Indian political officer in Sikkim who, according to the terms of the treaty, acts as India's representative.

Bhutan.—Bhutan is of strategic importance to the Union of India, lying on the latter's north-eastern frontier, and is surrounded by Sikkim, Tibet and North East Frontier Agency on its three sides. Under the treaty of 1865 concluded between the Government of India and Bhutan, she was to enjoy the status of an Indian State but it was accorded a special position, like Sikkim, in contradistinction to other native States of India. Presently, Bhutan is a protectorate of the Union of India by virtue of the treaty concluded between the two States in 1949, and the latter is to advise, govern, control and regulate the former's foreign relations and external affairs. Bhutan enjoys, like Sikkim, complete internal autonomy. In September, 1971, the semi-independent Himalayan kingdom, Bhutan, having an area of 25,000 square kilometres and 750,000 inhabitants, was admitted as a member of the United Nations. Even after admission to the United Nations, under the 1949-treaty, Bhutanese external affairs are to be conducted with the guidance of the Government of India.

British Protectorates.—Basutoland, Bechuanaland and Swaziland are the three British protectorates in South Africa. South Africa has been claiming their transfer since almost 40 years. The British, however, claim that the protectorates could not be transferred to the Union except with the consent of the African population of the protectorates and the consent of the British Parliament.

The Malay a Federation consisting of Malay States, Penang and Malacca had been another British protectorate. In 1957 the Federation of Malaya acquired independence and was admitted to the U. N.

The Ionion Islands were made a protectorate of Great Britain by a treaty between Great Britain, Austria, Prussia and Russia in 1815. The islands became a part of Greece in 1863 when the protectorate came to an end.

The island of Samos, which had been declared a protectorate under the joint guarantee of Great Britain, France and Russia, was annexed by Greece in 1914 when the protectorate came to an end.

On the 8th October, 1962, Great Britain handed over constitutional instruments by which she surrendered her 63-year old protectorate over Uganda and recognised the independence of Uganda, which became Africa's 33rd independent nation.

French Protectorates.—Tunisia and French Morocco in North Africa, and Annam, Tonkin and Cambodia in South East Asia constitute the French protectorates. By the Versailles Treaty Morocco was split into three parts, one part falling under the French Protectorate, the second under the protection of Spain and the third constituted the naturalized zone of Tangier. The French Government maintained that the protectorates owed their progress to France and as such they regarded any outside interference in the administration of territories under her guardianship as an insult. The Tunisians and Moroccans clamoured for their inalienable right to end the colonial rule. Tunisia became independent on March 20, 1956, and was admitted to the

United Nations on November 12, 1956. On March 2, 1956, France recognised the independence of Morocco, and Morocco was admitted to the United Nations on November 12, 1956.

## Mandated and Trust Territories

Development of the Mandate Principle.—"Though the mandates system was an innovation in the fields of International Law and of colonial policy and though it owed its creation mainly to the need for disposing of a pressing political problem, it is also the fact that, underlying this institution, are ideas which had for a long time been taking shape in the minds of idealists, statesmen, and experts in colonial matters and in International Law and which had been disseminated by philanthropic and progressive circles in different countries. Some of these ideas had, in fact, already found expression though in somewhat indefinite form, in international conventions.

"At the outset of the period of modern colonisation (in the 16th and 17th centuries), colonisers concerned themselves almost solely with the exploitation of the conquered are as for their own benefit and that of the mother-country. Though sometimes religious motives were alleged, nothing was as a rule undertaken in this direction beyond attempts to effect a rapid and superficial conversion of the natives, and if these failed the latter were often exposed to the worst kind of treatment or even to extermination. International Law, which began to develop at this period, was held to apply only as between Christian States and therefore afforded no protection whatsoever to peoples dwelling outside the sphere of European civilisation. Neither as individuals nor as communities could the natives possess any rights, but their conquerors acquired rights over them. Thus they were entirely dependent upon the humanitarian sentiments of the colonisers and these as a rule proved a very dubious safeguard. The well-being or material and moral needs of the natives were scarcely considered.

"Gradually, however, humanitarian, political or economic considerations brought about a reaction against this state of affairs. A keener sense of moral responsibility for the welfare of native races began to develop among colonisers. Towards the end of the 18th century, and still more at the beginning of the 19th, theologians, philosophers and politicians of advanced ideas raised their voices against abuses such as slavery and advocated fairer treatment for the native inha. itants of colonial territories. At the same time a truer appreciation of the economic potentialities of such territories brought about a realisation that a policy of good treatment of the natives could not be otherwise than beneficial to the interests of the colonizers.

"The mandatory idea made its appearance in the international sphere in a number of isolated cases in which the Powers entrusted one of their members with a specific task—sometimes of limited duration. Thus, in 1815, Great Britain took over the protection of Ionian Islands, under a sort of mandate conferred upon her by Russia, Prussia and Austria at the Conference of Paris. In 1860, France intervened in Lebanon in order to protect the Christian population of that country (the Maronites), in virtue of a mandate from the Great Powers.

"The notions of tutelage, of trusteeship, and even of a mandate in respect of the native populations were not unknown prior to 1919. Equality of conditions in the economic sphere had also already been recognised in principle as regards certain parts of Africa. The main elements, therefore, of the mandate system existed not only in theory but had even to a limited extent been put into practice in a few cases.

"On taking up the question of the fate of the German colonics and of the territories of the Ottoman Empire inhabited by non-Turkish populations, the Peace Conference, in 1919, found itself confronted with a peculiarly complex problem. A medley of factors of different kinds had to be taken into account: the actual situation resulting from the war, the claims of Allied countries and the agreements reached between them, the interests of the inhabitants of the territories in question, the trends of public opinion, the principl s formulated by the Governments which were to serve as criteria for the general peace settlement and, finally, the differing degrees of civilisation which had been attained by the peoples inhabiting these territories and which rendered a uniform solution impossible.

"In the plan for a League of Nations published by General Smuts in December 1918, on the eve of the Conference of Peace, we find for the first time the broad outlines of an international mandate system."

Mandated Areas.—The experiment of mandated territories was tried for the first time in 1919-20 under the League of Nations. These were former enemy territories and were alleged to be inhabited by backward communities who were not able to stand by themselves under the strenuous condition of the modern world. Under Article 22 of the Covenant of the League of Nations such ex-enemy territories which were surrendered by Germany and Turkey to the Allies were subjected to a tutelary regime under the ultimate responsibility of the League. The League handed over these territories for administration under "mandate" to advanced nations who by reason of their resources, their experience or their geographical position could best undertake this responsibility and who were willing to accept it. Such nations administered these territories subject to the supervision and ultimate authority of the League of Nations.

It was further provided in Article 22 that the character of the mandate was to differ according to the stage of the development of the people, the geographical situation of the territory, its economic condition and other circumstances.

There were three types of mandates, viz. :

- A. Certain communities formerly belonging to the Turkish Empire which had reached a fairly advanced stage of development where the mandatory merely rendered administrative advice and assistance till such time as they were able to stand alone. Examples of this type were: Iraq administered by Great Britain; Palestine (and Transjordan) administered by Great Britain; and Syria and Lebanon administered by France.
- B. Other peoples, especially those of Central Africa, who were at such a stage that the mandatory must be responsible for the administration of the territory under conditions guaranteeing freedom of conscience and religion, subject to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic, and the liquor traffic, etc. Its examples were British Cameroons, British Togoland and Tanganyika administered by Great Britain; French Cameroons and French Togoland administered by France; and Ruanda Urundi by Belgium.
- C. Territories such as South-West Africa and certain of the South Pacific Islands which, owing to the sparseness of their population or their
  - 1. The Mandate System, Geneva, 1945, League of Nations Publications VIA, pp. 7-15.

small size, or their remoteness from the centres of civilization or their geographical contiguity to the territory of the mandatory, were administered as integral portions of the territory of the mandatory subject to the safeguards mentioned above in the interests of the indigenous population. They were distributed as follows: South-West Africa administered by the Union of South Africa; Samoa by New Zealand; Nauru by the British Empire jointly by Great Britain, Australia and New Zealand; and Pacific Islands north of the Equator by Japan and those south of the Equator by Australia.

Lord Balfour thus explained the mandate system in 1922: "The public mind might have misunderstood the powers of the League of Nations and its Council regarding the mandates. The mandates were not the creation of the League of Nations and they could not in substance be altered by the League whose duties were confined to see that the specific and detailed terms of the mandates were in accordance with the decision taken by the allied and associated powers.....that in carrying out these mandates, the mandatory power should be under the supervision, not under the control of the League. A mandate was a self-imposed limitation by the conquerors on the sovereignty which they exercised over the conquered territory. In the general interest of mankind, the Allied and the Associated Powers had imposed this limitation u on themselves and asked the League to assist them in seeing that the general policy was carried out; but the League was not the author of the mandatory system. The duty of the League was first to see that the terms of the mandates were in conformity with the principles of the Covenant and secondly that these terms would in fact regulate the policy of the mandatory power in the mandated territories."

The mandate system was supervised by he League through the Permanent Mandates Commission consisting of a majority of members from the non-mandatory States.

The Report of the Mandates Commission on the work of the 20th session (1931) laid down that the question whether a political community, hitherto under tutelage, has become fit to be able to stand alone without the advice and assistance of a mandatory depended on political, social and economic development of the territory. In each it is a question of fact and not of principles. The Commission laid down the conditions requisite for a mandated territory to become independent, these being a settled government, capacity maintain its territorial integrity and political independence, ability to guarantee of protection to racial, linguisitic and religious minorities and a competent judicial organisation.

The Mandate system, started from the year 1919, came to an end in 1946, when it was superseded by the trusteeship system.

Trust Territories.—The Charter of the United Nations Organization introduced a new system of "trust-territories" as a corollary to the former mandates system. Article 77 of the Charter provides that the trusteeship system shall apply to (a) territories now held under mandate; (b) territories which may be detached from enemy States as a result of the Second World War; and (c) territories voluntarily placed under the system by States responsible for their administration. The trusteeship system does not apply

to territories which have become members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

The objects of the trusteeship system are enumerated in Article 76 of They are to further international peace and security, to promote the political, economic, social and educational advancement of the inhabitants of the trust-territories and their progressive development towards self-government or independence, to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion, and to ensure equal treatment in social, economic and commercial matters for all members of the United Nations and their nationals.

The terms of trusteeship for each territory to be placed under the trusteeship, including any alteration or amendment, shall be agreed upon by the States directly concerned, including the manda tory power in the case of territories held under mandate by a member of the United Nations. The trusteeship agreements must in each case include the terms under which the trust territory is to be administered and designate the authority which has to exercise the administration of the trust territory. Such authority is called the administering authority, which may be one or more States or the Organisation itself. It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defence and the maintenance of law and order within the trust territory.

The functions of the United Nations in respect of the supervision of trust territories and the approval of the terms of trusteeship agreements and of their alteration or amendment are carried out in the cases of strategic areas by the Security Council (which may avail itself of the assistance of the Trusteeship Council for performing such functions of the U. N. as relate to political, economic, social and educational matters in the strategic areas and in the case of all other trust territories by the General Assembly assisted by the Trustceship Council.

The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out its functions.

Composition.—The Trusteeship Council consists of those members of the United Nations who are administering trust territories, the members of the Security Council who are not in charge of any trust territory and as many other members elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those members of the United Nations which administer trust territories and those which do not. Each member of the Trusteeship Council has to designate one specially qualified person to represent it therein.

Functions and powers.-The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions may (a) consider reports submitted by the administering authority; (b) accept petitions and examine them in consultation with the administering authority; (c) provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and (d) take these and other actions in conformity with the terms of the trusteeship agreements.

13

The Trusteeship Council has to formulate a questionnaire on the political, economic, social and educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

Voting and Procedure.—Each member of the Trusteeship Council has one vote. Decisions of the Trusteeship Council are made by a majority of the members present and voting. The Trusteeship Council adopts its own rules of procedure, including the method of selecting its President. It has to meet as required in accordance with its rules, including provision for convening of meetings on the request of a majority of its members.

The Trusteeship Council must, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialised agencies in regard to matters with which they are respectively concerned.

Declaration to place mandated territories under the trusteeship system.—At the first Assembly of the United Nations in 1946 Great Britain, Australia, New Zealand, Belgium and, with some qualifications, France made declarations announcing their intention to place their mandated territories under the trusteeship system. South Africa, however, claimed the right to incorporate the mandated territory.

South-West Africa.—By virtue of this stand taken by South Africa in respect of her mandated territory, viz., South-West Africa, she discontinued sending reports and petitions from the inhabitants of South-West Africa to the United Nations. The General Assembly of the United Nations, therefore, submitted a series of questions to the International Court of Justice. The two important questions for decision of the Court were:

- (1) What are the international obligations of the South African Government with regard to the former mandated territory of South-West Africa?
- (2) Has the South-African Government the right to modify the international status of South-West Africa, and, in the event of a negative reply, where does competence rest to determine and modify the international status of the territory?

On July 11, 1950, the International Court of Justice—the highest tribunal in the world—unanimously decided at The Hague that South-West Africa was still a territory under international mandate and that the Union of South Africa was not competent to modify its international status. The findings of the Court may be summed up as under:

- (1) The Court held by 12 votes to 2 that South Africa continued to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South-West Africa, including the obligation to submit reports and transmit petitions from the inhabitants of that territory, the supervisory functions to be exercised by the United Nations, to which the annual reports and the petitions are to be submitted.
- (2) The Court unanimously decided that the provisions of Chapter XII relating to trusteeship of the U. N. Charter were applicable to South-West Africa in the sense that they provided a means by which the territory might be brought under the trusteeship system; but by a majority of eight to six

the Court decided that the provisions of Chapter XII of the Charter did not impose on the Union of South Africa legal obligation to place the territory under the trusteeship system.

- (3) The Court unanimously held that the Union of South Africa acting alone had not the competence to modify the international status of the territory of South-West Africa and that the competence to determine and modify the international status of the territory rested with the Union of South Africa acting with the consent of the United Nations.
- (4) The terms of the original mandate given to the Union Government did not involve any cession of territory or transfer of sovereignty to the Union of South Africa. The Union Government was to exercise an international function of administration on behalf of the League with the object of promoting the well-being and development of the inhabitants.
- (5) As regards the argument advanced by the Union Government that the mandate had lapsed because the League had ceased to exist, the Court observed that if the mandate lapsed the Union Government's authority would equally have lapsed. There was a dissenting opinion by three Hague Judges—a Russian, a Belgian and a Chilean—who held that South Africa was legally obliged to place South-West Africa under the U. N. Trusteeship system, inasmuch as all the mandatory powers except South Africa had consented to the conversion from the mandatory to the trusteeship system.

The trusteeship system represents a compromise between the competing claims of interested Powers. And as Duncan Hall observes, the trusteeships are examples of the international frontier in which Powers, sparticularly the Great Powers, expanding along their main lines of communications to the limits of their political and economic influence and their defence requirements impinge upon each other in conflict or compromise.

The administering States have to perform a large number of duties in regard to trust territories, and any dispute arising between the trust territory and the administering State is referred to the International Court of Justice. The administering authority does not exercise sovereignty over the trust territory and has international obligations in respect of the same.

Of the original II Trust Territories there remain only two—New Guinea and the Trust Territory of the Pacific Islands-which have not yet attained the Charter goal of self-government or independence.

Competence of the General Assembly to revoke the Mandate for South Africa.—The Union of South Africa has consistently followed the policy of racial discrimination in its administration of the mandated territory, and the matter received the attention of the General Assembly from time to time. It has in this manner flouted the mandate. Repeated United Nations resolutions have had no effect on the Union of South Africa in regard to the mandated territory of South-West Africa (now called Namibia). Ultimately the United Nations General Assembly resolved on October 27, 1966, to terminate South Africa's right to administer the territory. In its resolution the Assembly declared that South Africa has failed to fulfil its obligations in respect of the administration of the mandated territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South-West Africa, and has, in fact, disavowed the mandate, and consequently it decided that the mandate conferred upon His Britannic Majesty to be

exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no right to administer the territory and that henceforth South-West Africa shall be under the direct responsibility of the United Nations. To give effect to the above resolution, the General Assembly established an ad hoc committee for South-West Africa comprising fourteen member States and charged upon the ad hoc committee to recommend practical means by which South-West Africa should be administered, so as to enable the people of the territory to exercise the right of self-determination and to achieve independence.

Resolutions of the General Assembly .- In order to enforce its decision the General Assembly has to enlist the support of the Security Council for taking legally binding decisions. The Security Council can take punitive action of an institutional character and enforcement action as envisaged in Chapter VII of the Charter. As regards punitive action of an institutional character, the General Assembly can, upon the recommendation of the Security Council, suspend or expel a member from the organization. The various resolutions passed by the General Assembly of the United Nations have condemned South Africa for its policy of racial discrimination and have also proclaimed that the policy pursued by South Africa has led to international friction constituting a danger to international peace and security. In November 1962 the General Assembly adopted a resolution calling upon member States to break off diplomatic relations or refrain from establishing such relations, close their ports to all vessels flying the South African flag and boycott all South African goods. In 1963, the Security Council recommended an arms embargo against South Africa. Earlier in 1962, an embargo on oil supply to South Africa had been imposed by the U. N. Trusteeship Committee. The UNESCO, the FAO, the ILO and the Economic Commission for Africa have set the process of its expulsion or forced withdrawal. On November 2, 1972, the U. N. General Assembly called upon countries to withhold aid to South Africa, Rhodesia and Portugal until they renounce their policy of colonial domination and racial discrimination.

The action taken against South Africa in the nature of punitive action of an institutional character, preventive or enforcement action, has not eased the problem. If anything, it has hardened the attitude of South Africa. In this view of the matter even suspension or expulsion of South Africa from membership of the United Nations cannot solve the problem.

Difficulty in implementing the measures.—The difficulty in the implementation of any of the measures provided in the Charter is that the big powers, namely, Great Britain and America, are not in a position to impose any sanctions against South Africa on account of their political and economic affiliations with that country. America has a huge trade with the Republic of South Africa. American banks have made renewable cred it to the tune of 40 millions of dollars to the Union. The exports of the United States to South Africa have increased enormously. West Germany is also doing enormous trade with South Africa. Against the waves of indignation shown by the United Nations from time to time against South Africa, there is a massive common economic link built on fabulous profits between the racist minority regime of South Africa and the leading Western powers.

Even if there were a consensus of opinion among big powers for taking enforcement action against South Africa, the cost of a naval blockade of

South Africa's principal ports, which is a pre-requisite for the success of economic sanctions, would be enormous and it is difficult to conceive that the United Nations will be in a position to undertake such a formidable venture.

The ad hoc committee, constituted in accordance with the General Assembly's resolution of October 27, 1966, terminating the mandate over South-West Africa, for devising practical means by which South-West Africa should be administered, was duly wound up on the adoption of a resolution on May 19, 1967. Under the new resolution an eleven-member Council was elected on the 14th of June, 1967, by the General Assembly. It resolved that the newly created Council for South-West Africa should contact South Africa for laying down procedures for the transfer of the territory. The new resolution could not be said to be a step in furtherance of the previous resolution of October 27, 1966, terminating the mandate over South-West Africa.

Advisory opinion of the International Court of Justice on the Legal consequences for States of the continued presence of South-Africa in Namibia. - The International Court of Justice in its advisory opinion on the status of South-West Africa opined on the 21st of June 1971, that it considered South Africa's presence in South-West Africa to be illegal and that it should withdraw from the territory immediately. The opinion, by 13 votes to two, had been sought by the United Nations Security Council. The General Assembly had passed a resolution in 1966 terminating South Africa's mandate over South-West Africa, granted to the former by the League of Nations fifty years ago. Before acting on that resolution, the Security Council wanted to arm itself with the World Court's advisory spinion on the issue. The Security Council seeking support for its efforts to force a South African withdrawal, had asked the Court for its opinion on the legal consequences of South Africa's continued presence in South-West Africa. The two dissenting votes were cast by the Judges of Britain and France.

By 11 votes to four, the Court advised that the U.N. members were under obligation to recognise the illegality of South Africa's presence there and the invalidity of its acts on behalf of or concerning Namibia (South-West Africa) and to refrain from any acts, and in particular any dealings with the Government of South Africa, implying recognition of the legality of, or lending support or assistance to, such presence and administration.

The South African Premier, John Verster, rejected the World Court's finding that South Africa's continuing presence in Namibia was illegal. He observed that an advisory opinion, by its very nature, was of no binding force, and in the present case was totally unconvincing.

International Trusteeship and Mandates.—The system of international trusteeship is more comprehensive than the system of mandates associated with the League of Nations. The idea which runs throughout the Charter is to encourage respect for human rights and for fundamental freedoms for all without any distinction. The Charter further lays down that the object of trusteeship is to further international peace and security. This clause embodies a very progressive step from the point of view of the interest of the inhabitants of trust territories. And, as Oppenheim observes, "this somewhat general statement signifies the intention to abandon the drastic limitations which the Covenant imposed upon the mandatory in respect of recruitment in and fortification of the roundated territories." Article 73 of the Charter of the United Nations requires members of the United Nations

assuming responsibilities for the administration of territories to, accept as sacred trust the obligation to promote to the utmost the well-being of the inhabitants of these territories. Further, the functions and activities of the trusteeship are also wider than those of the mandates.

Neutralised States.—"A neutralized State is one whose independence and political and territorial integrity are guaranteed permanently by a collective agreement of Great Powers subject to the condition that the particular State concerned will never take up arms against another State—except to defend itself—and will never enter into treaties of alliance, etc., which may compromise its impartiality or lead it into war." According to Svarlien, "States whose independence and neutrality are guaranteed for all future time by treaty are known as 'neutralized' States."

The neutralized State is, therefore, prohibited from carrying on war except in its own defence or from entering into treaties or arrangements with other States that may affect its neutrality in time of war. The great powers also guarantee in return its inviolability. The neutralized State to this extent limits the exercise of its sovereign rights. The prohibition proceeds from the general body of nations. The object of neutralization is to protect weak States from their powerful neighbours, but no State can be neutralized without its consent. The big powers neutralize a weak State for the purpose of maintaining the balance of power by keeping it a buffer-State in between their frontiers.

It is often argued that a neutralized State is a part-sovereign State as it cannot enter into treaties of alliance with or declare war against another State. But this argument is fallacious for a neutralised State is as fully sovereign as any non-neutralized State in matters falling within its territory. Moreover independence or full sovereignty does not connote unlimited liberty without any restrictions whatsoever. The States through conventions, treaties and the like take upon themselves many obligations which hamper their freedom in internal as also international jurisdiction. A neutralized State does not differ from a fully sovereign State in these respects.

Switzerland.—Switzerland has pursued a policy of neutrality since 1648. On March 20, 1015, at the Congress at Vienna, Great Britain, Austria, France, Portugal, Prussia, Spain, Sweden and Russia accorded to Switzerland the status of permanent neutrality and collectively guaranteed its independence. The Swiss statute of neutrality prohibits her from participating in political or military alliances. This position of Switzerland was recognised by the Council of the League when she was admitted as an original member on the understanding that she shall not be forced to participate in a military action or to permit the passage of foreign troops or the preparation of military enterprises upon her territory. Her neutrality was respected by the belligerents in both the world wars.

Switzerland has refused to join the United Nations lest membership in the U. N. should infringe her neutrality since the Charter makes collective military sanctions against the offending State a duty for all members. She, however, participates fully in specialized agencies of the United Nations and is a party to the Statute of the International Court of Justice.

Belgium and Luxemburg.-Belgium and the Grand Duchy of Luxem-

Starke: An Introduction to International Law, 5th Ed., p. 113.
 Oscar Svarlien: An Introduction to the Law of Nations, p. 87.

burg, which were neutralized between varying periods, ceased to have that status by the Treaty of Versailles, 1919, inasmuch as their neutrality was violated by the Germans in 1914. Both Belgium and Luxemburg are members of the United Nations.

Distinction between Neutralized and Neutral States.-It is important to observe the distinction between the status of a neutralized State and the status of a neutral State. The term neutrality denotes a treaty between two States whereby they mutually agree that if one of them is attacked by a third State, the other will maintain an attitude of neutrality towards the conflict. Neutrality, therefore, involves two essential elements, viz., the element of abstention from acts of war and the element of freedom to abstain or not to abstain at pleasure. In neutralization the first element remains the same, viz., the element of abstention from acts of war; but instead of the second we have either an obligation not to fight except in the strictest self-defence, or an obligation to abstain from warlike use of certain places and things which have had the neutral character stamped on them by international agreement. Neutrality, therefore, is a temporary affair, but neutralization is a permanent measure, the status having been guaranteed by the explicit agreement of a limited number of great powers, accompanied by a definite sanction and a corresponding obligation on the part of the neutralized State to remain as such. Enforced neutrality is, therefore, the essence of neutralization. Neutralization, therefore, involves neutrality, but neutrality does not necessarily involve neutralization. In short, neutralization is permanent, general and involuntary, while neutrality is temporary, particular and voluntary.

Starke observes that "neutralization differs fundamentally from neutrality, which is a voluntary policy assumed temporarily in regard to a state of war affecting other Powers, and terminable at any time by the State declaring its neutrality. Neutralisation, on the other hand, is a permanent status conferred by agreement with the interested Powers, without whose consent it cannot be relinquished."

# THE QUESTION OF DIMINUTIVE STATES

Since the second world war, almost all the erstwhile colonies have been granted independence. Most of them did not grow out of the natural course of national evolution, but were products of inter-imperial rivalry and accords signed in the European capitals. The colonial powers left them as they were and, consequently, some of them even though sovereign stand as tiny entities whether as regards area, population or national economy. Since every state, irrespective of its size or power, has one vote in the United Nations, the question of diminutive states has now turned into a problem difficult to resolve.

A sovereign state is one which has a permanent population, defined territory, effective government and independence. There is no minimum size prescribed. Oppenheim has cited the examples of Vatican City, Monaco, San Marino and Liechtenstein which in his opinion can qualify as sovereign states. At the time of admission of individual diminutive states to the United Nations, no one raised any objection as to their size, although the degree of sovereignty enjoyed by them was sometimes questioned. Some of them do have very close relationship with larger states, but then even some bigger states are in fact satellites of some or other super power. Some theorists like Dr. Higgins, Bowett and O'Connell have tried to introduce a variable concept of statehood, i. e. the small states are eligible for ful Imembership of the Specialised Agencies but not of the United Nations itself. But the theory is not

<sup>1.</sup> Starke: An Introduction to International Law 5th Ed. p. 114.

tenable if we closely examine the relevant provisions of international law. The concept of statehood cannot be used in different senses by the same actors (diplomatic representatives of the states) in similar fora (intergovernmental organisations) for the same purposes (participation).

The second objection that is often raised is regarding the ability of diminutive states to fulfil the obligations of membership. The obligations of members of the United Nations are not very onerous. Most of the provisions of the Charter are nothing but rules of peaceful behaviour which are pursuable by big and small states alike. The most onerous obligation in the Charter seems to be the one contained in Article 17 (2)—the obligation to contribute to the U. N. budget. The minimum annual contribution to the U. N. budget currently comes to about 55,000 dollars which is a pretty big sum for diminutive states. The expense was the main factor in deterring the states of Nauru and Western Samoa from applying for admission. Some of the diminutive states, e. g. Iceland, do not have any armed forces at all and even when one of them maintains an army it would inevitably be quite ineffective. Even so, some provisions of the Charter, such as Art. 43 (1), would be deemed to have been complied with if the members provide only "assistance and facilities, including rights of passage". Military assistance is not a strict requirement. Moreover, non-military sanctions as provided for in the Charter require merely an abstention from having economic and diplomatic relations which poses no problem for any state. It has been argued that the diminutive state's economic and political dependence on a bigger state may come in the way of its taking sanctions against the latter. However, Article 50 give states facing special economic problems as a consequence of carrying out the sanctions the right to consult with the Security Council as to how they can be resolved. When admitting such permanently neutral states as Austria the U. N. showed its willingness to ignore their inability to participate in such sanctions. The political dependence of diminutive states is no real handicap, as the powers delegated by them to their big neighbours are, in most cases, revocable. Moreover, the bigger state also normally is a member of the U. N. and it would violate Article 2 (5) of the Charter if it prevents the client state's participation in sanctions.

The third point that comes up for consideration is regarding the desirability of the diminutive state's membership. The membership confers on a state some sort of prestige in political circles. The U. N. happens to be an international platform and being its member normally means being better equipped to resist political pressure from the powerful states. The U. N. also serves as a diplomatic exchange, in the sense that ambassadors of all states are present and active under the same roof and for diminutive states this service is invaluable as they may save the cost of maintaining atives at every capital. If the diminutive states are debarred from membership, then, as Jenks has remarked, "they may become havens of exemption for the lawless...or for over-mighty interests." On the other hand, the disadvantages of admitting the diminutive states are obvious. The combined voting strength of all eligible diminutive states is quite substantial although their combined populations would amount to no more than that of one normal state. In conjunction with another block they could easily sway the General Assembly while their contributions to the U. N. expenses would be negligible. Admission of such a large number of states to full membership would also entail

<sup>1.</sup> M. H. Mendelson: Diminutive States in the United Nations, International and Comparative Law Quarterty, Vol 21, 1972, p. 610, 614.

a great strain on U. N. resources, in terms of seating capacity, documentation, duration of meetings, reimbursement of travel expenses of delegates, etc.

Writer Nkambo Mugerwa, however, holds a different view. According to him, "They (the diminutive states) are certainly not typical full subjects of international law. They are all dependent to a greater or lesser extent on a third state, especially for the conduct of their foreign relations......While possessing a defined territory, a government and a population, these states do not possess the full capacity to enter into foreign relations. For this reason they cannot be regarded as fully sovereign independent states."

In 1967, the U. N. Secretary-General pointed out that full membership for these states might be too onerous for them and might weaken the U. N. also. The United States raised the issue in the Security Council. The United States put forward its proposal in the following terms. The diminutive states would be designated as associated members of the United Nations. They would enjoy all the rights of full members in the General Assembly, except the right to vote or hold office; "appropriate rights" in the Security Council, when that body is taking action which affects them; "appropriate rights" in the Economic and Social Council and in the regional commissions and other bodies; and access to U. N. assistance in economic and social fields. In return, the associate members would be subject to all the obligations of members, except that of monetary contribution to the U. N. Budget.

The United Kingdom made a simpler proposal. The diminutive state would be admitted in the same way as other states, but when applying for membership it would voluntarily renounce the right to vote or to hold office. Its contribution to the U. N. budget would be nominal. The British proposal does away with the creation of an inferior class of members. Further, since the renunciation of rights would have to be voluntary, the U. N. Charter would not require any amendment.

The Security Council Committee of Experts on this subject was set up in 1969, but it has not been able to deliver its final opinion so far.

The Holy See and the Vatican City .- The Church and her main body the Holy See have constantly obliged the secular power to recognize their independence. Although after the amnexation of the Papal States by Italy in 1870 the Holy See ceased to exercise any territorial sovereignty which had been exercised for more than 1,100 years, her independence was not only admitted but recognized by the State Laws, and even during the period 1870-1929 Italy did not claim territorial sovereignty over the Holy See. The Italian Law of Guarantees conferred on the Pope personal immunities and prerogatives as are accorded by International Law to the heads of sovereign States. The Pope and his successors were also guaranteed the possession of the Basilica of St. Peter, the Vatican and Lateran Palaces as well as the villa of Castel Gandolfo. The Holy Father had complete authority within this area. The Pope was also offered an indemnity of an annual sum for the loss of his temporal possessions. But Pius IX proclaimed himself a "prisoner in the Vatican" refusing to accept the terms of the Law of Papal Guarantees, enacted by the Italian Parliament in May 1871, on the ground that such enactments by the Government of Italy were unilateral, alterable

14

<sup>1.</sup> C/o Manual of Public International Law: Edited by Max Sorensen; Subjects of International Law, Nkambo Mugerwa, p. 262.

at any time by the Italian Parliament. He demanded a guarantee not by the Government of Italy but the recognition of this position by other States as well. The Government of Italy did not accede to this view, with the result that the relations between the Pope and the Government of Italy continued to remain strained for about half a century and the Pope never left the Vatican in the period between 1870 and 1929.

Finally, the Lateran Treaty of February 11, 1923, entered into between the Holy See and the Kingdom of Italy created the Vatican City, consisting of an area of about 1/2 km. sq. and having a population of 1,000, as a symbol of the Pope's territorial sovereignty. This marked a return of territorial possession to the Holy See which she had lost in 1870. The preamble to the Treaty emphasizes the necessity "to guarantee to the Holy See a complete and visible independence and a sovereignty unassailable in International Law". The chief aim of the treaty was the constitution of the territorial sovereignty of the See. The treaty contains an important provision for the acquisition of Vatican citizenship, which is made to depend on stable residence inside the Vatican City. It determines the precise boundaries of the Vatican City and grants the Holy See territorial sovereignty within these boundaries similar to the territorial sovereignty accorded by International Law to other States.

The Vatican is a permanently neutralised country, its territory being inviolable. This neutrality was respected by the belligerents during the second world war. Under Art. 24 of the Lateran Treaty the Holy See has declared to keep itself aloof fr m rivalries of a temporal nature between other States and from international congresses convened to deal with them, unless the contending parties make a joint appeal to its mission of peace.

The Holy See although strictly temporal can be classed as a true State She has the right of legation under the Lateran Treaty. The sovereignty of the Holy See in the international field is clearly acknowledged, and article 26 recognizes the State of the Vatican City under the sovereignty of the Pope. Article 22 provides for an extradition clause which obliges the Holy See to extradite a culprit if the act has been committed on Italian Territory and the same is regarded as crime by the laws of both States. The State has not only concluded several agreements with Italy but also with other foreign powers, which clearly go to show that she has an independent personality clearly recognized by International Law. Professor Oppenheim shares the view that "the Lateran Treaty has treated a new international State of the Vatican City, with the incumbent of the Holy See as its Head. That State possesses the formal requirements of statehood and is an international person recognized as such by other States. Its true significance in the field of International Law lies in the fact that international personality is here recognised to be vested in an entity pursuing objects essentially different from those inherent in national States such as those which have hitherto composed the society of States." Lauterpacht, Guggenheim and Verzijil also share the view that the Vatican is a State, albeit a tiny one.

The Holy See maintains diplomatic relations with third states and has entered into treaties, particularly of a humanitarian character, such as the Convention relating to the Status of Stateless Persons, 1954. The Vatican City is a member of the International Telecommunication Union and Universal Postal Union, the two Specialised Agencies of the United Nations. It is

<sup>1.</sup> Oppenheim: International Law, Vol. I, 8th Ed., p. 254.

also a party to other conventions and is invited to participate in diplomatic conferences and treaties sponsored by the United Nations.

There are, however, certain other writers on International Law who hold that the Vatican does not fulfil the test of statehood. This view is endorsed by Mendelson who observes that "in two respects it may be doubted whether the territorial entity, the Vatican City, meets the traditional criteria of statehood. In the first place, it can hardly be said to have a permanent population capable of maintaining and reproducing itself. Apart from a few lay officials and their families, the population consists entirely of celibate clergy and nuns; moreover, Vatican nationality attaches to them only for the —usually limited—time during which they are seconded to the Holy See. Secondly, the various 'governmental' functions conducted in the Vatican are not, for the most part, exercised in relation to, or for the benefit of, the City itself. But even if the Vatican cannot then be classed as a State, it is not its exiguity that is the cause."

In this connection the observations of Svarlien are pertinent: "The Lateran Treaty returned the Holy See to the society of nations, but it is difficult to decide, in terms of International Law, whether the statehood in this case is vested in the Holy Sec or in the Vatican City. Some writers have even contended that the effect of the treaty was to create two international persons instead of one—the Vatican City and the Holy Sec—and that the only point of dispute was whether the union between the two was personal or real. A more accurate view, perhaps, would be that the Latern Treaty, by the constitution of the Vatican City, did create a new State and that the incumbent of the Holy See is its head. The main significance of this treaty in the law of nations is due to the fact that international personality is here seen to repose in an entity pursuing objects on the whole so different from those of national States". The special status of the Vatican City, however, ensures the Pope to exercise his spiritual functions freely, and in that respect it is somewhat analogous to that of the hedquarters of the international organizations.

Even the new Constitution of the Italian Republic gives recognition to the fact that the State and the Catholic Church are independent and sovereign in their own sphere and that their relations are regulated by the Lateran Pacts.

### CHAPTER IX

## THE COMMONWEALTH OF NATIONS

Relations between Great Britain and the members of the Commonwealth.—Relations between Great Britain and the other self-governing independent States, which once constituted the British Empire, though not strictly international relations, offer a remarkable example of harmonions co-operation between the various constituents. The Commonwealth is an association of 32 independent member nations. India is an independent sovercign republic and yet is a member of the Commonwealth. Pakistan, Sri Lanka (Ceylon), Ghana, Nigeria, Cyprus, Tanzania, Kenya, Malawi, Zambia, Singapore, Botswana, Guyana and Gambia are other republics. There are now

<sup>1.</sup> Cf. Pearce Higgins, "The State of the City of the Vatican" (1929) 10 B. Y. I. L. 214; Brownlie Principles of Public International Law (1966), p. 59.

M. H. Mendelson; Diminutive States in the United Nations. The International and Comparative Law Quarterly, Vol. 21, 1972, p. 609, 612.

<sup>3.</sup> Svarlien: An Introduction to the Law of Nations. p. 89.

eleven African members, viz., Nigeria, Ghana (the new name of former colony of Gold Coast, includidg the former trust territory of Togoland), Sierra Leone, Uganda, Kenya, Nyasaland (now known as Malawi), Tanzania (formerly Tanganyika joining with Zanzibar), Northern Rhodesia now known as Zambia, The Gambia, Botswana and Lesotho; theree West Indian (Jamaica, Trinidad and Tobago and Barbados); one South American, viz., Guyana; five Asian, viz, India, Bangladesh, Ceylon, Malaysia and Singapore; and only six white members, viz., Britain, Australia, Canada, New Zealand, Cyprus and Malta. In what was strictly and exclusively a white man's Imperial Club (really a British Club) has completely changed its character in about the last fifteen years. In the words of Jennings, the 'Crown' has performed the even more remarkable feat of converting the Empire into a Commowealth. But with new developments "even allegiance to the Crown, the legal ties, can scarcely be regarded as a necessary requirement of nembership of the Commonwealth".

On January 30, 1972, Pakistan terminated its membership of the Commonwealth in retalion for the decision of the United kingdom, Australia and New Zealand to recognise Bangladesh. In April 1972 Bangladesh won formal acceptance as the 32nd member of the globe-girdling Commonwealth. Under Commonwealth rules all members must formally agree to the admission of a new State.

The Queen is recognised as Head of the Commonwealth. Britain, Canada, Australia, New Zealand, Sierra Leone, Jamaica, Trinidad and Tobago, Malta, The Gambia, Guyana and Barbados are monarchies in which (except Britain) the Queen is represented by a Governor-Generaal; India, Pakistan Ghana, Nigeria, Cyprus, Tanzania, Kenya, Malawi, Zambia, Singapore Botswana, Guyana and Gambia are republics; Malaysia and Lesotho have their own monarchs and Uganda its own President who is Head of State.

During the latter half of the nineteenth century the Dominions attained nationhood rapidly. There used to be conferences of Governments under the chairmanship of the Prime Minister of the United Kingdom—such conferences for the purpose of holding consultation started since 1887. They were named the Dominions enjoyed the right to make separate treaties with foreign powers took part in the affixing of the Great Seal to the formal instruments. They were granted the right of separate diplomatic representation.

The Statute of Westminster, 1931.—This was an Act of Parliament of the United Kingdom defining the legislative powers of the Dominions of the British Commonwealth and giving statutory effect to resolutions passed by the Imperial Conferences held in 1926 and 1930. The preamble to the Statute affirmed the free association of the members of the British Commonwealth of Nations united by a common allegiance to the Grown.

Section 2 of the Statute of Westminster provided that the Colonial Laws Validity Act, 1865, shall not apply to any Law made after the commencement of the Act by the Parliament of a Dominion. The provisions of the section abolished the doctrine of repugnancy and conferred full sovereign power on Dominion legislatures. Section 3 provided that it was declared and enacted territorial operation. Section 4 of the Statute provided as follows: "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law

<sup>1.</sup> C/f. The Commonwealth iu Brief: Brtisish Information Services.

unless it is expressly declared in that Act that the Dominion has requested, and consented to, the enactment thereof."

Since the passing of the Statute of Westminster, 1931, the members of the Commonwealth are now sovereign States and enjoy full international personality. They possess unlimited autonomy in external affairs. They have separate rights of entering into treaties and also legation. The 1926 Imperial Conference, a term now obsolete, denoted by the periodic meetings of Commonwealth Prime Ministers, described the Dominions as "autonomous Communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

The Dominions are full international Persons, possess all the external attributes of sovereignty and have even the capacity to declare war, the Queen only acting on the advice of the Commonwealth Government concerned. Their full independence may be deemed to be qualified in the sense that they have agreed as a result of the recommendations of the Imperial Conference of 1930 to have mutual consultation in vital matters affecting peace and war but this does not amount to any legal limitation of their full international capacity.

Prime Ministers' Meetings.—From 1944 onwards the pre-war Imperial Conferences have been replaced by less formal Prime Ministers' meetings. Although no precise rules of procedure govern Prime Ministers' meetings, certain conventions have grown up over the years. For example, it is understood that the internal affairs of a member country will not be discussed, although the Prime Minister of South Africa voluntarily waived this convention in 1961. Another convention is that disputes between one Commonwealth country and another will not be discussed except with the consent of the parties to the dispute.

"The purpose and object of discussion at Commonwealth meetings has been not so much to concert a common policy or to plan joint action but rather to ensure that all Commonwealth Governments have a common understanding of what may be at stake and that they appreciate the motives and purposes underlying the policies which each is separately pursuing. The objective has always been to reach the highest measure of understanding, not the lowest measure of agreement."

The Present Position of the Commonwealth.—The British Commonwealth is a unique political formation. It is neither a State nor federation; it has no written constitution, no parliament of its own, no government of its own, no central defence forces or executive power. It is a product of history and development, grown, not designed and the relationship between its members is woven by an invisible thread which binds them together.

The various dominions and republics found in the Commonwealth of Nations are united as free and equal members of the Commonwealth of Nations, freely co-operating in the pursuit of peace and progress. It is a free association of independent nations where member countries are in no way subordinate to one another in any aspect of their domestic or international affairs.

The association is purely voluntary and the members may at any time

withdraw from the Commonwealth without any obligation as has been done by Ireland, Pakistan and Burma. This association is not disturbed by the withdrawal of any member from the Commonwealth, except of course the United Kingdom.

The Crown which played a predominant part in the former unity of the Commonwealth is no longer the main link which joins members of the Commonwealth. This has been made clear in the case of the republics with Presidents as head of the State. India does not owe allegiance to the Queen, but has accepted on her part the King or Queen as the symbol of free association of the independent member nations and as such the head of the Commonwealth.

There is a regular representation of each Government at their capital cities in the Commonwealth made by the High Commissioners who are equal in rank and status to the ambassadors representing the foreign states. Between those Commonwealth members who acknowledge the Queen as Head of State High Commissioners are appointed from Government to Government, not, as in the case of ambassadors, by Head of State to Head of State. With Commonwealth members who have a Head of State other than the Queen, High Commissioners are accredited from Head of State to Head of State.

The member countries of the Commonwealth vary widely in their size, the racial composition of their population, language, industrial development and the influence which they command in shaping international policies and focussing the attention of the various countries towards the common problem. The countries represented at the Commonwealth include, besides the United Kingdom, Dominions, Republics and monarchies. The United Kingdom, Ghana, Ceylon and New Zealand are unitary States, while Canada, Australia and Pakistan are federal in character; India is virtually a federal State and South Africa had been substantially a unitary State. Most of the Stares are monarchies owing allegiance to the British monarch who is represented in many cases by Governors-General appointed by the Crown on the advice of the Governments of the respective countries. These are called Dominions; and several others are republics with Presidents as heads of States. Further many members of the Commonwealth have involved themselves in military and other regional pacts such as those signed at Manila and Baghdad. There is a closer link of Australia, New Zealand and Canada to Britain on account of the fact that historically they have grown from colonies peopled by British settlers. And on account of their location in the Pacific, Australia, New Ze aland and Canada have greater links also with the U.S. A. Further, as olserved by Dr. A. Appadoral, "in foreign policy each nation has developed along its own lines. Australia and New Zealand are linked with the United Kingdom and Pakistan in SEATO and with the U.S. A. in the Pacific Security Pact; Canada has economic and defence ties with U.S.A.; the U. K. is tied up with western European neighbours under the Brussels Treaty and with Canada in the NATO. Pakistan (which terminated its membership in 1972) has obligations to Britain under the SEATO and the Baghdad Pact and to U. S. A. under her military alliance with that country." India has, however, followed an independent foreign policy which is not tied up to any power bloc.

In spite of these differences the Commonwealth is characterised by an independent outlook of its member nations, who came from all the five continents, viz., America, Europe, Africa, Asia and Australia. They are perfectly free to follow their own policies, domestic or foreign.

The Commonwealth is undergoing a change. The inner composition and content of the Commonwealth is fast changing. As observed by Bevan,

the British labour leader, "the word 'British' in the British Commonwealth should be dropped now; it is merely a hangover of the old imperialistic attitude." The Commonwealth has ceased to be British-dominated or even white-dominated. The Asian, African and Caribbean countries overwhelm the United Kingdom both in number and population. From the original four white dominions tied to Britain, by kinship and common interests the Commonwealth has now 32 members, and the white members have been reduced to a minority. It has expanded so rapidly that links become ever more tenuous between members.

Position of Commonwealth in International Law. - As regards the position of the Commonwealth in international law it is not entirely clear-Each member state has a separate membership of the United Nations, in the same way as most of the older dominions were members of the League of They have given separate adherence to the International Court of Justice. "These factors go a long way towards establishing the recognition of the independent status of members by foreign states. But the conception of the Commonwealth as an entity recognised in international law has not been raised. As between the members of the British Commonwealth it is recognised that a State is not bound by a treaty made in the name of the Crown to which it has not assented and which it has not ratified. Similarly, no state would be regarded as under any obligation to assist in a war declared without its consent. These are matters, not of international law, but of interimperial relations. The Grown, however, is the formal head of the Commonwealth, though in the case of India and Pakistan, the Queen is only accepted as the symbol of free association between independent States and allegiance is not owed to her."1

The Commonwealth, as observed by Scott, is neither a state nor a federation. It has no single parliament or Government and no central defence forces or executive power. It has thus no single personality either in international or municipal law.

Each of the Commonwealth nations pessesses unlimited autonomy in international affairs and enjoys complete freedom of action in war or in peace. This became clear when during the Second World War Ireland remained neutral throughout the war. Further, formal declarations of war were made by the members of the Commonwealth on different dates. Canada declared war on Germany seven days after such declaration by the United Kingdom, it being made by the King on September 10, 1939, on the advice of his Canadian Ministers following the acceptance by the Canadian Parliament of an address from the Throne. On September 6, 1939, the Governor-General of South Africa issued a proclamation notifying a state of war with Germany. "It is thus difficult to contend that a declaration of war by the Government of the United Kingdom would bind the other members of the Commonwealth without their governments making separate declarations."1 A member of the Commonwealth, as stated earlier, has the power to secode from the Commonwealth by making a declaration of independence which fos international validity may be given effect to by the Government of U. K., as happened in the case of Burma, when on her election not to remain within the Commonwealth S. 1 of the Burma Independence Act, 1947, give effect to

"Now that the African peoples are joining with their European and Asian brothers," observed the Rt. Hon. Earl Attlee, "the Commonwealth is characterised by its inclusiveness, not its exclusiveness. It is bound together

<sup>1.</sup> Warle and Godfrey Phllips; Constitutional Law, Fifth Ed., p. 476.

not by claims, but by intangible links which have, in times of stress, proved their strength."

Commonwealth on Trial on Rhodesian Unilateral Declaration of Independence.—On November 11, 1965, the white-settler colony of Rhodesia (formerly called South Rhodesia) proclaimed a Unilateral Declaration of Independence (U. D. I.). Rhodesia has a population of about 5 million, of whom only about 250,000 are whites and the rest are coloured. And yet the white minority rules the country and there is no native representation in the government or the legislature. Therefore, in effect this declaration meant the continuance of white domination.

Britain retaliated by ordering the suspension of the Rhodesian Prime Minister, Ian Smith, and all his ministers. The British Prime Minister, Harold Wilson, condemned the Rhodesian action as "an illegal act ineffective in law." He announced some measures against Rhodesia, including Rhodesia's removal from the sterling area, a halt to all British aid to that country including the supply of arms and spares, and a ban on further purchases of tobacco from Rhodesia. He also announced the suspension of Commonwealth ties so far as Rhodesia was concerned. The British Government, however, ruled out military action against the Rhodesian government, as some African countries had urged.

The Security Council condemned the Rhodesian rebel regime and declared it "an illegal entity which all states should abjure."

Evidently, the British reluctance to use force was motivated by their desire to avoid the shedding of British blood for the sake of Africans. But this annoyed, and even enraged, the African countries. The 36-member Organisation of African Unity met in Addis Ababa on December 4, 1965, and decided that it would break off diplomatic relations with Britain if it failed to crush by December 15 the rebels in Salisbury. Sensing that no British military action would ever start, Guinea broke diplomatic ties with Britain on December 14, Tanzania on December 15 and Ghana on December 16.

Rhodesia became a republic on March 2, 1970, casting aside all its links with the British Crown. The rule of the white minority was well and truly secured by a constitution approved in a referendum in 1969—a referendum in which 100 000 of the 250,000 whites are eligible to vote against only 7,000 of the some five million blacks.

Dismantling the Commonwealth.—There is a tendency on the part of the present Conservative Government to transform Britain into a Europe-oriented power and in this process to snap off the links that unite the Commonwealth countries. The British Government has unilaterally decided to end the Commonwealth preference system in textiles. The imposition of tariff on textiles from the Commonwealth countries is not in keeping with Commonwealth spirit. The British Government has already abolished the Commonwealth office as a separate ministry and merged it with the Foreign Office. The Commonwealth cadre has been absorbed into the foreign service, Great Britain's recent decision to impose tariff on textiles from Commonwealth countries, its Rhodesia policy and the manner in which it handled the race problem have created serious misgivings in the minds of the nonzeuropean members of the Commonwealth.

The Commonwealth members have been reduced to a secondary position as a result of Britain's joining the Common Market on January 1, 1973.

#### CHAPTER X

### RECOGNITION OF STATES

As stated in an earlier chapter, Oppenheim is of the view that a state is, and becomes, an International Person through recognition only and exclusively. In order to correctly appreciate this proposition it is necessary to set out, in brief, the salient features and the theories of recognition.

Definition of Reconnition.—Jessup observes that recognition of State is the act by which another State acknowledges that the political entity recognised possesses the attributes of statehood.¹ Recognition may be defined as formal acknowledgment by an existing member of the international community of the international personality of a State or political group not hitherto maintaining official relations with it. It implies that in the opinion of the recognizing State the nascent community possesses the requirements of statehood, and is therefore a normal subject of international rights and duties.³ It is the free act by which one or more States acknowledge the existence on a definite territory of a human society politically organised, independent of any other existing State, and capable of observing the obligations of International Law and by which they manifest therefore their intention to consider it a member of the international community.¹

Theories of recognition.—There are two theories of recognition, viz., the constitutive theory and the declaratory or evidentiary theory.

According to the former, it is the act of recognition alone which creates statehood and clothes a new Government with authority in international sphere. It is the process by which a political community acquires personality in International Law by becoming a member of the family of nations.

Hegel was the founder of this school.) According to Anzilotti, since the rules of International Law have grown up by the common consent of the States, a subject of International Law comes into being with the conclusion of the first agreement as expressed by the treaty of recognition. Such a recognition is reciprocal and constitutive, creating rights and obligations which did not exist before. Holland leans in favour of the constitutive theory and in this sense shares the view of Oppenheim. He observes that a State cannot be said to have attained maturity unless it is stamped with the seal of recognition, which is indispensable to the full enjoyment of rights which it connotes.

The recognition of Poland and Czechoslovakia through the instrumentality of the Treaty of Versailles lends support to the constitutive theory of recognition.

The constitutive theory presents serious difficulties. It would oblige us to say that "an unrecognized State has neither rights nor duties at International Law," which is an absurd suggestion. Again the status of a State recognised by some States and not recognised by others presents a queer phenomenon. Non-recognition of a State by others is not conclusive evidence of the absence of qualifications requisite for statehood.

Jessup ; A Modern Law of Nations. p. 4.
 Fenwick ; International Law, p. 107.

<sup>3.</sup> British Year Book of International Law, 1944, p. 127.

<sup>4.</sup> Institute of International Law, American Journal of International Law (1936) Vol. 30. p. 185

According to the latter theory statehood or the authority of a new Government exists prior to recognition and the act of recognition is merely a formal acknowledgment or admission of an already established fact. In other words, the exponents of this theory maintain that recognition merely has a declaratory, not a constitutive, effect, inasmuch as recognition merely declares an existing fact that a particular community or Government possesses the necessary qualifications of a State as required by International Law.

Article 3 of the Montevideo Convention of December 26, 1933, stated: "The political existence of the State is independent of recognition by the other states. "Even before recognition the State has the right to defend its integrity and independence, to provide for its conservation and prosperity and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define its jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other States according to International Law."

It is said in support of this view that Japan was possessed of all the clements of statehood, even long before the formal establishment of relations with the western world in 1854.

The exponents of this theory are Hall, Wagner, Fischer, Pitt Cobbett and Brierly.

Professor Hall maintains that the State, which is theoretically a politically organised community, enters as of right into the family of States and must be treated according to law as soon as it is able to-show the marks of statehood. No State has a right to withhold recognition when it has been earned.

Pitt Cobbett in consonance with the declaratory theory is of the view that the existence of a State is a matter of fact for "so long as a political community possesses in fact the requisites of statehood, formal recognition would not appear to be a condition precedent to the acquisition of the ordinary rights and obligations incident thereto." This view lends support to the famous declaration of Nepoleon: "The French Republic no more needs recognition than the sun requires to be recognized."

According to Brierly the granting of recognition to a new State is not a 'constitutive' but a 'declaratory' act; it does not bring into legal existence a State which did not exist before. A state may exist without being recognized, and if it does exist in fact, then, whether or not it has been formally recognized by other States, it has a right to be treated by them as a State.<sup>1</sup>

Oppenheim's view.—Adverting to the view of Oppenheim, who advocates the constitutive theory, a State is, and becomes, an international person through recognition only and exclusively. The proposition, although partially true, is not the whole truth. Recognition is, no doubt, one of the chief methods of putting the seal of approval upon the existence of a State. But if this view were to be accepted, it will be difficult to account for a new State recognized by some States and refused by others. The Chou En-lai Government of Red China, although recognised by India, Britain, Soviet Russia, Canada, Italy, and more than forty other States, had not been accorded recognition by U. S. A. and other countries and was for long not admitted to the membership of the United Nations. The State of Red China, however, continued to exist in spite of the non-recognition by America and its non-admission to the U. N. And even prior to its admission the

1, J. L. Brierly: The Law of Nations, 5th Ed., p. 131.

U. N. officers conducted cease-fire negotiations in Korea with the Red Chinese representatives. Furthermore, it was even invited to the various conferences to case international tension. It might be of interest to note in this connection that in February 1973 China and the United States agreed to establish a liaison office in each other's capital, virtually to serve as a de facto diplomatic mission, without the formal nomenclature. An effective stabilised Government within a certain territory is, as observed by Dr. Alf Ross, decisive for the existence of the new State and also for its subjection to International Law.

In Wulfsohn v. Russian Socialist Federated Soviet Republic<sup>1</sup> the Court went to the length of holding that the Soviet Union, Although its government was unrecognised by the United States, was immune from jurisdiction by American Courts. The Court observed: "The Russian Federated Soviet Republic is the existing de facto government of Russia......Whether or not a government exists, clothed with the power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force is a fact, not a theory. For its recognition does not create the State, although it may be desirable." The political existence of a State is independent of recognition by other States.<sup>2</sup>

It was observed in German Polish Arbitral Tribunal (1929, that recognition of a State is not constitutive but merely a declaratory act inasmuch as the State exists by itself and recognition is nothing but the ascertainment of that existence.

Recognition, no doubt, enables a State to enter into diplomatic relationship with other States. But it cannot be asserted that non-recognition of a State does not confer on it international status. Statehood exists even prior to recognition. A State ipso facto becomes a member of the Family of Nations by its very birth and recognition only paves the way and furnishes evidence for its existence as an independent nation. Furthermore, the above view is stengthened by the fact that recognition is retroactive, i.e., it dates back to the time when the recognised community in fact possessed the necessary elements of statehood, thereby showing that the State existed much prior to the date of its recognition. Again, acquisition of statehood is a matter of fact, and the process of acquisition is political in nature, not legal.

U.S. Court of Appe d of New York, 1923, 231 N. Y. 372.
 Charter of American States Organisation, Art. 9.

<sup>3.</sup> Starke : An Introduction to International Law, 5th Ed., p. 124.

Svarlien also shares this view when he observes "...It might be said that recognition is always declaratory in that it confirms the existence of a State and recognizes its legal position in the international community. But it may also, at times, be constitutive in so far as it has the effect of actually creating a State where none existed before."

Recognition—a legal or political problem.—Recognition is generally granted or withheld on legal principles. It is, however, often governed by considerations of economic, strategic or other political interest. It is in such cases dictated more on the ground of policy and political expediency than the admission of existing facts. Pressure from influential groups as in the case of Israel may shorten the process of the formal recognition of a State. But as Corbett observes: "Once a political community has achieved a certain degree of development......it has such right as exists among States to legal treatment. In this sense, and in this sense alone, it has a right to be 'recognized." There is ...no right to formal recognition. This is something which States grant or refuse at discretion. It is a counter in the harsh game of international politics." Even where political considerations prevail, that fact does not affect its legal nature, for recognition while declaratory of an existing fact is constitutive in its nature.

It was laid down by the United States District Court in Bank of China ve Wells Fargo Bank & Union Trust Company<sup>3</sup> that more recently recognition has been granted and withheld at the diplomatic bargaining table and that conflicting considerations are balanced in the executive decision.

Professor Lauterpacht in his new constitutive theory points out that recognition is not an act of policy as embodied in the traditional constitutive theory and that there is a duty on each State towards the international community to recognise a new State or new government fulfilling the legal requirements of statehood / The theory is in accord with the majority view of the International Court of Justice in its Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations where the Court observed that paragraph 1 of Article 4 of the Charter precludes the idea that considerations extraneous to these principles and obligations can prevent the admission of a State which complies with them. (Starke differs from Professor Lauterpacht's thesis on the ground that the weight of precedents and practice did not support his views as to the law. He observes that the divergences in the recognition of the new State of Israel (1948-49) and of the People's Republic of China since 1949 can hardly be reconciled with them. If indeed there were such a legal duty to recognise, it is difficult to say by whom and in what manner it could be enforced ? To each duty, there must correspond a correlative right, and how would one define this right? Is it a right of the State claiming to be recognised, or a right of the international community, and how would such claims of right be presented? The answer to these questions must be that there is no general acceptance of the existence of the duty or the right mentioned. No right to recognition is laid down in the Draft Declaration on the Right and Duties of States, drawn up by the International Law Commission in 1949. The action of States in affording or withholding recognition is as yet uncontrolled by any rigid rules of international law; on the contrary recognition is treated, for the most part, as a

P. E. Corbett: Law and Society in the Relations of States, p. 64.
 (1952) 104 F. Supp. 59.

<sup>1.</sup> Svarlien: Introduction to the Law of Nations, pp. 97-98.

matter of vital policy that each State is entitled to decide for itself. Podesta Costa's view that recognition is a 'facultative' and not an obligatory act is more consistent with the practice. There is not even a duty on a State under international law to withdraw recognition if the qualifications of statehood or of governmental authority cease to exist." The political expediency that governs in such cases is only offset by the fact that while granting recognition the States generally make sure that the nascent community possesses the requirements of statehood in the legal sense. To this extent recognition fully takes into account legal principles.

The view that the granting of recognition is a political rather than a legal act is reinforced by the observations contained in a memorandum of March 8, 1950, prepared under the direction of the Secretary-General of the United Nations for presentation to the President of the Security Council on the demand of the Chinese Communist Government for replacement by her representatives on seats occupied by the Nationalist Government of China in the various organs of the United Nations. The relevant observations,

are as under :

From the standpoint of legal theory, the linkage of representation in an international organisation and recognition of a government is a confusion of two institutions which have superficial similarities but are essentially different."

"The recognition of a new State, or of a new government of an existing State, is a unilateral act which the recognizing government can grant or withhold. It is true that some legal writers have argued forcibly that when a new government, which comes into power through revolutionary means, enjoys a reasonable prospect of permanency, the habitual obedience of the bulk of the population, other States are under a legal duty to recognize it. However, while States may regard it as desirable to follow certain legal principles in according or withholding recognition, the practice of States shows that the act of recognition is still regarded as essentially a political decision, which each State decides in accordance with its own free appreciation of the situation."

That the decision to recognise or refuse to recognise a State is a political matter is further clear from the fact that executive decisions or reports from their foreign office are final and conclusive on this question.

While the States as a rule have refused to adhere to any rule of collective recognition of a State by the United Nations, the membership of a State in the United Nations and representation of a state in the organs is clearly determined by a collective act of the appropriate organs; in the case of membership, by vote of the General Assembly on recommendation of the Security Council, in the case of representation, by vote of each competent organ on the credentials of the purported representatives. Since, therefore, recognition of either State or government is an individual act, and either admission to membership or acceptance or representation in the Organization are collective acts, it would appear to be legally inadmissible to condition the latter acts by a requirement that they be preceded by individual recognition. This conclusion is clearly borne out by the practice in the case of admission to membership in both the League of Nations and in the United Nations.

Hallstein's Doctrine.—In the case of dismemberment of a part of the State and the establishment of a new State or Government as a result of the liberation movement, as in the case of the Bangladesh Government, the attitude of some of the western countries and of pro-Pakistan nations was initially based on the West Germany's now-abandoned "Hallstein Doctrine" under which no country could have simultaneous diplomatic relationship with

<sup>3.</sup> J. G. Starke: An Introduction to International Law, 7th Ed., p, 146.

two Germanys. The Hallstein Doctrine, named after Dr. Walter Hallstein, State Secretary for Foreign Affairs of the Federal Republic of West Germany, envisaged that recognition of the East German regime (German Democratic Republic) by a third State would be considered as an unfriendly act by the Federal Republic of Germany and would mean the breaking off of diplomatic relations with the third party in question. The doctrine is fallacious and smacks of political considerations in the determination of the question of recognition of a State.

### Forms of Recognition

1. Express and Implied Recognition.—Recognition may be express or implied. Express recognition is accorded by some formal declaration. Implied recognition is effected through acts which imply an intention to grant recognition; it is accorded by entering into a bilateral treaty regulating relations, or by accrediting diplomatic representatives. Issue of a consular exequator by the recognising State also establishes implied recognition. But the participation of an entity in an international conference or organization or in the negotiation of a multilateral treaty will not be sufficient evidence to imply formal recognition of that entity's statehood, unless there be an unequivocal intent to extend recognition.

Recognition may be granted either individually or collectively by a number of States.

As a rule recognition once given is irrevocable. A formal severance of diplomatic relations may subsequently be declared, but it does not annul the recognition of a State already given nor does that State lose its status in the international community. Great Britain recognised the Soviet Government de jure in 1924, but later broke off relations in 1927, but that did not affect the status of the Soviet Government.

2. Conditional Recognition.—States are also recognized sometimes subject to some condition. The Berlin Congress of 1878 recognized the States of Bulgaria, Rumania, Servia and Montenegro on the condition that they did not impose any religious disabilities on any of their subjects. Since the recognition once made cannot generally be withdrawn, the failure to fulfil the obligation does not annul the recognition. The recognized State can only be guilty of violation of international law. The recognizing State can also sever diplomatic relations by way of sanction. An exception to the non-revocability of recognition is, however, furnished in the case of a nascent State. Thus Great Britain granted recognition to the Esthonian National Council in 1919 "for the time being provisionally and with all necessary reservations as to the future." This was regarded on all hands as a revocable recognition.

Professor Lauterpacht condenns the practice of States to exact some guarantee or undertaking while granting recognition as a "spurious use of the weapon of recognition", and as contrary to the true function of recognition which is the ascertainment and declaration of certain factual requirements of statehood or governmental capacity." Starke does not agree with this view and observes that Judge Lauterpacht overlooks not merely the weight of the practice, but also the important consequences of recognition on its internal law, for example, as regards property rights, which each State is entitled to consider for itself.

On the question of Bangladesh's admission to the United Nations, the General Assembly, acting on a formulation submitted by its President,

<sup>1.</sup> Starke: An Introduction to International Law, 5th Ed., p. 129.

adopted simultaneously two resolutions on November 29, 1972, which expressed two viewpoints. In one resolution the Assembly expressed its desire that Bangladesh be admitted to the United Nations at an early date. In the other resolution the Assembly urged the parties to 1971—conflict on the South Asian subcontinent to seek a fair settlement of pending issues. It specifically called for the return of prisoners of war in accordance with the 1949 Geneva Conventions and the provisions of the Security Council's resolution of December 21, 1971. The President of the General Assembly while introducing the two resolutions emphasized their interdependence. The resolutions passed simultaneously and treated as interdependent were not in accord with the Advisory Opinion of the International Court of Justice of May 28, 1948, on Conditions of Admission of a State to Membership in the United Nations.

Judge Lauterpacht is also of the view that the test applied in recognising a new State or new Government of its willingness to fulfil international
obligations is "of doubtful judicial soundness", and unrelated to the true
purpose of recognition. Starke does not share this view either as being contrary to the practice of most States. Pointing out the inconsistency with his
view that the United Nations might well deem admission to it a proof of
statehood or governmental capacity, he observes that even Article 4 of the
Charter provides that United Nations membership is open to "peace-loving
States" which in the judgment of the Organisation are "able and willing" to
carry out the obligations of the Charter.

3. Collective Recognition .- Collective recognition through the medium of an international institution removes the anomaly of some States granting recognition and others refusing to do so. The Treaty of London recognized Greece in 1830 and Belgium in 1831. The Berlin Congress of 1878 collectively recognised Bulgaria, Montenegro, Servia and Rumania, while the Supreme Council of the Allied Powers accorded collective recognition in 1921 to Esthonia and Albania, thereby extending recognition on behalf of France, Italy, Japan and Great Britain without separate acts of recognition by the four powers. This collective recognition paves the way for admission of the recognised State as a member of the family of nations. Such "collective recognition," is treated by some authors as "simultaneous or general. recognition", and the only collective recognition possible today is recognition of a State by an international organization, like the U.N., admitting the same to its membership. Quincy Wright and Wesley Gould regard collective recognition by the United Nations as no more than that the entity granted membership be treated as if it had been recognised in dealings inside the United Nations but net elsewhere.2 The position seems to be correct, and the Secretary-General opined in a memorandum submitted to the President of the Security Council on the 8th March, 1950, that the act of recognition is a political decision which each State decides in accordance with its own free appreciation of the situation and that the United Nations does not possess any authority to recognise either a new State or a new government of an existing State.

 Starke: An Introduction to International Law, p. 130.
 Wright: Some Thoughts about Recognition, 44 A. J. L. (1950) & Wesley L. Gould: An Introduction to International Law, p. 234. But it has been suggested that admission to the United Nations is like admission to a private club which does not confer statehood on the personality so admitted. In proof of it, it is said that the admission of Bye-lo-Russia and the Ukraine to the United Nations did not confer upon them a higher personality or qualities of statehood in a greater measure than enjoyed by Switzerland, a non-member. Only in such cases as Israel and Libya it could however be said that the political actions of the United Nations conferred the qualities of statehood, but there again it was the factum of birth, and not the act of recognition, that was decisive.

\*Collective Non-Recognition—A collective non-recognition such as through the League of Nations or now the United Nations may indicate some sort of a protest against an existing situation. A collective non-recognition of Manchukuo on the recommendation made by the League of Nations "was an impotent collective protest against a sham independence too transparent to camouflage protest."

The difficulty in the way of collective recognition is that, as the representatives of the United States observed on the Palestine question in the Security Council, there were certain powers and certain rights of a sovereign State which were not yielded by any of the members who signed the United Nations Charter, and in particular this power to recognize the de fact of authority of a provisional Government was not yielded. Further, the States have refused to accept the rule of collective recognition through an international organization such as the United Nations, and the United Nations does not possess any authority to recognize either a new State or a new government of an existing State. To establish the rule of collective recognition by the United Nations would require either an amendment of the Charter or a treaty to which all members would adhere.

De facto and De jure recognition.—Diplomats distinguish between recognition de facto and de jure. The former means that in the opinion of the recognising State the new authority, although actually independent and wielding effective power in the territory under its control, has not acquired sufficient stability as to show that it will be able to maintain its independence over a prolonged period and yet fulfils the requirements laid down by International Law for effective participation in the international community, the recognised State or Government fulfils the test laid down by International Law for effective participation in international community. This necessitates the exchange of diplomatic representatives and naval salutes between warships.

According to British practice three conditions are required as a precedent to the grant of de jure recognition of a new State or a new Government, viz., (i) a reasonable assurance of stability and permanence; (ii) the Government commands the general support of the population; and (iii) it is able and willing to fulfil its international obligations.

According to the practice of States de facto recognition is provisional and may not bring about full diplomatic intercourse, but still it is more or less regarded as a prelude to de jure recognition.

<sup>1.</sup> Smith Great Britain and the Law of Nations, Vol. I, p. 79.

According to Lauterpacht de facto recognition is an expression of desire to enter relations with the regime in power but for the time being without the usual diplomatic courtesies.

Some authors regard de facto recognition of an entity as a conditional recognition of statehood. That only expresses doubt about the stability of the new entity and avoids any offence to the parent state by premature de jure

recognition.)

In the case of the Gagara<sup>2</sup> where the question as to the status of the Esthonian National Council was raised, the Law Officers informed the Court that His Majesty's Government provisionally recognised the Esthonian National Council as a de facto independent body and accordingly received a certain gentleman as the informal diplomatic representative of the Esthonian Provisional Government. The Court of Appeal held the such provisional recognition accorded, for the time being, to the Esthonian National Council the status of a foreign sovereign; that to permit the arrest of its vessel would be contrary to principles of international comity, as it would compel the Esthonian Government, whose sovereignty was entitled to be respected, to submit to the jurisdiction of the British Courts; and that the writ and all subsequent proceedings must be set aside.

In a conflict between a displaced de jure Government and a newly formed de facto Government, the English Court of Law has held that the rights and status of the de facto Government prevail over the de jure Government. This proposition was laid down in two cases, viz., Bank of Ethiopia v. National Bank of Egypt and Liguori<sup>3</sup> and the S. S. Arantzazu Mendi v. The Government of Republican Spain.<sup>4</sup>

Halian conquest of Abyssinia in 1936. The Italian Government, after its de facto recognition in Abyssinia, enacted certain laws in conflict with those issued by the exiled Emperor of Abyssinia, who was still regarded as the de jure ruler in exile. It was held by Clauson J., that the authority of the de jure ruler was merely theoretical and was not capable of being enforced, while the Italian Government was in control of Abyssinia and had received de facto recognition and as such it had authority to frame laws and not the de jure monarch.

Where a revolution has taken place in a foreign country and the new government has been recognised as the de jure sovereign of that country by the British Government, that new government is entitled to the possession and custody in England of records and State archives deposited in England before the revolution by the old government: Union of Soviet Socialist Republics v. Onou.<sup>5</sup>

In the case of the S. S. Arantzazu Mendi, there was a conflict of rights between the legitimate and the insurgent Governments in Spain during the Spanish Civil War (1936-38. The insurgents had won over the greater part of Spanish territory. Great Britain continued to recognise the Republican Government as the de jure Government of Spain, but also gave recognition to the insurgent administration as the de focto Government of the portion of Spain occupied by it. Proceedings were initiated in the British Admiralty Court by the de jure Government against the de facto Government of General Franco to recover possession of the ship in question. The ship was registered at the port of Bilbao, which had been captured by the Government of Franco. The de facto

<sup>1.</sup> Lauterpacht: Recognition in International Law, p 33%.

<sup>2. (1919)</sup> Probate 95. 4. 1939 A. C. 256. 3. 1937 Ch. 513. 5. 1925) 69 Sol J. 676; 2 B I. L. C., 134.

Government of General Franco claimed immunity from suit in a foreign State on account of being a fully sovereign State.

Lord Atkin in the House of Lords delivered a memorable judgment in the case by holding that the de facto Government exercised all the functions of a sovereign Government in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the government, and consequently owned property, whether for military or civil purposes, including vessels, whether warships or merchant ships. The argument of the de jure Government that the insurgent administration was not a sovereign State was rejected. The writ was accordingly set aside as the insurgent (or Nationalist) Government was held to be a sovereign State and as such entitled to immunity.

The English Courts will not inquire into the validity of the acts of a foreign government which has been recognised by the British Government. In this respect it is all one whether the foreign Government has been recognised as a government de jure or de facto : Company for Mechanical Woodworking A. M. Luther v. James Sagor & Co.1

The English Courts will not enforce or aid in the enforcement of political or liscal offences aganist the law of another State : State v. Hynes.2

Information from Foreign Office.—The information received from the foreign office as to the status of a nascent community is conclusive for the Courts of the countries. It was so held in the Civil Air Transport Incorporated v. Central Air Transport Corporation.3 A similar question was earlier raised in the case of the Arantzazu Mendi.

The daclaration of the executive on the question of recognition of a foreign State or Government is always treated as conclusive and binding upon the Courts of the land and thes: declarations are considerered as acts of State, falling within the discretion of the Head of the State. [Luther v. Sagor, the Dora, Duff Development Co. v. Government of Kelantan and Sultan of Johore v. Abubakar Tuuku].

There is no ground for saying that because the question involves considerations of law these must be determined by the courts. The answer of the King, through the appropriate department, settles the matter whether it depends on fact or law : Duff Development Co. Ltd., v. Government of Kelantan.

It was observed by the Supreme Court of the United States in Jones v. United States8: "Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political question, the determination of which by the legislative and executive departments of any Government conclusively binds the Judges, as well as other officers, citizens, and subjects of that Government."

The Court takes judicial cognizance not only of the status, but also of the boundaries of foreign States, and if in doubt will apply for information to the Secretary of State for Foreign Affairs whose reply is conclusive : Foster v. Globe Venture Syndicate Ltd.9

Courts should not regard executive policy in respect to recognition and non-recognition of foreign governments as meaningless or of little consequence. In any particular situation, executive policy may be crucial. But, it is a fact which properly should be considered and weighed along with the

<sup>1. (1921) 3</sup> K. B., 532 : 2 B I. L. C. 97.

<sup>2. 8</sup> B. I. L. C. 45.

<sup>3. (1952) 2</sup> All E. R. 733.

<sup>4.</sup> L. R. (1921) 3 K. B. 532.

L. R. (1919) 105.

<sup>6. (1924)</sup> A. C. 71 7. 7. L. R (1952) A. C. 318. 8. 137 U. S. 207.

<sup>(1900)</sup> I Ch. 811.

other facts before the Court : Bank of China v. Wells Fargo Bank & Union Trust Company.

Where, on an application for a writ of Habeas Corpus by an interned German national, a certificate was produced from the Secretary of State for Foreign Affairs stating (a) that the Allied Powers had assumed supreme authority with respect to Germany including all powers possessed by the German Government and other German authorities; (b) that Germany still existed as a State and German nationality as a nationality; (c) and that no treaty of peace or declaration of the Allied Powers having been made terminating the state of war with Germany, His Majesty was still in a state of war with Germany, it was held by Lord Goddard, C. J. in R. v. Bottrill, Exparte Kuechenmeister<sup>2</sup> that the Court had no right to go behind the certificate, but was bound by the statements therein contained.

Distinction between De Facto and De Jure Recognition. "1)e facto recognition", observes Schwarzenberger, "is by nature provisional and may be made dependent on conditions with which the new entity has to comply. It differs from de jure recognition of a State. There is not yet a formal exchange of diplo ratic representatives. The jurisdiction of the new international person is merely recognised to exist within its own territory and any extra-territorial effects of such jurisdiction are ignored. Thus, if a State which has received de jure recognition, should nationalise companies within its territory, its ownership in the property of such companies abroad (securities, land or ships) cannot be denied. If, however, such a State had merely obtained de facto recognition, such acts are without effect if purporting to apply to property in the country that has granted such de facto recognition ... there is an increasing tendency, both in decisions of national courts and amongst writers, to assimilate the effects of de facto recognition of a State to those of de jure recognition... In contrast to de facto recognition, de jure recognition is considered to be retrospective, that is to say, to date back to the time when the newly recognised entity actually came into existence."3

As indicated above, de facto recognition is provisional in nature, implying that the recognising State treats the recognised State "as an authority in fact, with undisputed control within the territorial limits of that State." Such de facto recognition is accorded for practical reasons and does not ensure formal diplomatic intercourse. Nor does such de facto recognition involve the question for consideration whether or not the de facto government has acquired power by legal means. De jure recognition, on the other hand, is complete, implying full and normal diplomatic relations.

From the point of view of legal effects there is hardly any difference between de jure and de facto recognition of a State, for the retroactivity of de jure recognition dates back to its de facto recognition. But as against a de facto government, a de jure government retains title in and control of property situated abroad. The Soviet Government could only get possession of Tsarist archives and other property in England not until its de jure recognition accorded in 1924.

De facto governments enjoy the same immunities from suit as de jure governments. But diplomatic courtesies and representation are usually not accorded to de facto governments except in extraordinary circumstances occurring in time of war.

2. (1946) 1 All E. R. 635; 1 B. I. L. C. 9.

<sup>1. 104</sup> F. Supp. 59.

<sup>3.</sup> Georg Schwarzenberger - A Manual of International Law, 2nd Ed., pp. 28-29.

Considerations for Recognition.—The traditional view has been that International Law imposes no duty upon States to recognise new States. Recognition, however, is more a question of policy than of law. States have frequently delayed, refused or eventually accorded recognition to newly formed States or Governments for reasons of diplomacy. In the First Great World War, Great Britain, France, the United States and other powers recognised Poland and Czechoslovakia before these latter had actually existed as independent States or Governments. In the case of the Soviet Government of Russia, established in November 1917, recognition was withheld by the United States and other powers for a few years partly because of uncertainty as to its tenure and partly because of the opposition to Bolshevik principles. Secretary Hughes observed on March 21 1923: "In the case of Russia we have a very easy test in a matter of fundamental importance, and that is of good faith in the discharge of international obligations. I say that good faith is a matter of essential importance because words are easily spoken. Of what avail is o speak of assurances, if valid obligations and rights are repudiated and property consticated. According to Lauterpacht the test applied in recognizing a new State or Government of its willingness to fulfil international obligations is of doubtful juridical soundness and unrelated to the purpose of recognition.

Recognition is often accorded even prematurely or withheld on the ground of national policy. De facto, and subsequently de jure, recognition of Panama by the United States within three days of the revolt affords an illustration for recognition being granted with a view to furthering national policies. For the same reasons France not only recognised the independence of the United States in 1778 but actually aided the hostilities against England.

The divergence of views in the recognition of the new State of Israel (1948-49) and the Red Chinese Government of Chou En-lai was also motivated by political expediency.

Secretary of State Acheson correctly asserted in September 1949 while addressing the Pan American Society of the United States that the American Government maintained diplomatic relations with other countries primarily because they were all on the same planet and must do business with each other. They do not establish an embassy or legation in a foreign country to show approval of its government. They do so to have a channel through which to conduct essential governmental relations and to protect legitimate United States interests.

The considerations which have often weighed with Foreign Offices in determining the grant or withholding of recognition include the freedom of the new State from external control, the probability that it will endure, the stability and effectiveness of its government, its ability and disposition to fulfil its obligation under International Law, the extent to which it commands international support, whether its recognition would offend an ally or be otherwise premature, the number of States that have already accorded recognition, and whether the new State really corresponds to political realities in the area concerned.

In reply to a request by the United Nations for observation on Article 2 of the Panama Draft Declaration on the Rights and Duties of States, which lays down that every State is entitled to have its existence recognised, the Government of the United Kingdom observed (a) that where an entity fulfils the conditions of statehood, there is a duty on all other States to recognise

<sup>1.</sup> Lauterpacht: Recognition in International L. w, p. 313

it; (b) that there is also a duty on all States not to recognise as a State any entity which does not fulfil these conditions. They agreed that the recognition and non-recognition of States is a matter of legal duty and not of policy and that the existence of a State should not be regarded as depending upon its recognition but on whether in fact it fulfils the conditions, which create a duty for recognition. It was added that recognition of an entity as a State in no way requires the entry into diplomatic relations with that entity. That is a matter for purely political decision. On the other hand, the entry of diplomatic relations with an entity implies that the entity is recognized as something. Whether it implies recognition de jure or de facto as a State, or as a belligerent community or as an insurgent Government, will depend upon the particular facts with regard to the relations so entered upon.

It was observed in Bank of China v. Wells Fargo Bank & Union Trust Company: that even if the Court were solely concerned with the implementation of our executive foreign policy, it would be presumptuous to bindly effectuate every act of a recognized government or to treat every act of an unrecognized government as entirely fictional. Early in our national history, our recognition policy was generally based on the executive's view of the stability and effectiveness of the government in question. More recently recognition has been granted and withheld at the diplomatic bargaining table. Our policy has thus become equivocal. Conflicting considerations are balanced in the executive decision.

Recognition of Governments.—When a change in the head of a State, which is already an international person, takes place in the normal and constitutional manner, such a change is notified to other States who accept the new head of the State by sending congratulatory messages. The difficulty, however, arises where a change in government-a term which is not synonymous with the term State-is Lrought about by revolution, i.e., by overthrow of the existing government or by a coup d'etat. In such cases two tests are to be applied: The first test is whether the new government is the de facto government in effective control of the State, exercising its authority over a substantial portion of the territory without any effective opposition. This is called the objective test. And the second test is whether the new Government is prepared to carry out the obligations imposed on it by International Law and the Charter of the United Nations. This is called the subjective test. The recognizing States defer any change in recognition when the new Government is not stable or where revolutions are very frequent necessitating the change of government. If, therefore, there is no likelihood of any change of government again, the subjective test is adopted and it is presumed from the conduct and declarations of the new government that it has the intention to carry out international obligations. This was so done by the United States of America when she granted recognition to the new Government of France established as a result of the French Revolution. The same test was applied in the case of Soviet Russia when she emerged as a result of the revolution of 1917, and it was presumed that the new government would be a peace-loving State, prepared to carry out its international obligations.

The granting or refusal of recognition of a government has, however, nothing to do with the recognition of the State itself. If a foreign State refuses the recognition of a change in the form of government of an old State, the latter does not thereby lose its recognition as an international person.<sup>2</sup> The State remains in existence however violent or drastic the form of the Government may have been.

United States District Court, 1952, 104 F. Supp. 59.
 Lehigh Valley Railroad Co, v. The State of Russia (1927), 21 F. 396.

Non-recognition of Government is no declaration of the non-existence of the government of a State. The acts of a deposed, unrecognised government are not illegal because of the lack of recognition: Tinoco case.1

Changes in the form of government of a State," observes Gould, "no more extinguish the international personality of the state than did military occupation and existence of the statehood of Germany. Indeed, even a condition of anarchy does not remove a community from the roster of states. A parliamentary system may be replaced by a dictatorship of the proletariat, a monarchy by a military junta. But such changes do not involve the substitution of a new state for an old one."2

The question that arises in such cases is whether a particular State emerging after its transformation is the same entity as its predecessor. That all depends upon the circumstances-whether the change has taken place in the nature of government or the state itself has so considerably reduced in size and undergone a change in the form of government that a new state may be taken to have come into being In the case of the Serb-Croat-Slovene Kingdom, the German-Yugoslav Mixed Arbitral Tribunal decided that it was a continuation of the Kingdom of Serbia and was not a new state within the meaning of Art. 297 (h) of the Treaty of Versailles. In the same manner the Russian State after its revolution in 1917 was treated to be the same State as existed before 1917. On the other ha d, the Austrian Republic was dismembered to such an extent as a result of the peace treaties after the first world war that the Austrian Republic courts regarded it as a new state, different from the Austrian monarch. Yet still in the Ottomon Debt Arbitration (1925) the sole arbitrator Eurgene Borel held that the Republic of Turkey continued the international personality of the former Ottoman Empire. In this conflicting state of affairs any kind of generalizations are not a safe guide. And as Gould observes "ordinarily, neither territorial changes nor changes in the form of government affect the continuity of the state. Only in exceptional cases, when simultaneous territorial change and change in form of government are so fundamental that the new entity, even in the national and cultural make-up of the population, hardly resembles the old, is the continuity to be regarded as broken."

Recognition of Government in Exile.—A Government of a State is said to be in exile when the territory of the State is occupied by enemy force. The occupation of the territory by the enemy does not imply that the Government in exile is not in effective control of territory, and such Government continues to be recognized as the Government of the occupied territory if it continues its efforts to regain control of the lost territory. During the second world war the governments of many European States established their head-quarters in London. If, however, at the termination of the war and conclusion of a treaty the Government in exile fails to regain control of the lost territory it loses it right to be recognized as the Government of the State.

Recognition of States.—The existence of a new State formed by the union of States previously independent requires recognition. Similarly recognition paves the way for a State's reception into the Family of Nations. It is true that recognition by one State does not bind other States although recognition by a leading power hastens general recognition.

Premature recognition is regarded as an unfriendly act and treated as an act of intervention or as a casus belli.

<sup>1. 18</sup> A. J. I. L. (1924), p. 127.

<sup>2.</sup> Wesley L. Gould: An Introduction to International Law, p. 242,

Even de facto recognition is sufficient to validate the acts of the State recognised: Luther v. Sagor. It was held in that case that the English Courts will acknowledge as valid the legislation of a foreign Government recognised by Great Britain, even though the recognition be only de facto.

Non-recognition of absorption.—Non-re ognition of absorption or the refusal to recognise the extinction of a state is made with the object of preventing the absorbing state from gaining the legal right of precription. The inhabitants of the annexed territory who depart before annexation and decline to accept the sovereignty of the new government are treated as stateless until they elect a new nationality: American Insurance Company v. 356 Bales of Cotton<sup>2</sup> and United States ex rel. Schwarzkopf v. Uhl.<sup>3</sup>

Stimson's Doctrine of Non-recognition. -At the time of the Japanese invasion of the Chinese province of Manchuria in June 1932 the Secretary of State of the United States, Mr. Henry L. Stimson, pointed out that the United States of America could not admit the legality of any situation de facto nor did it intend to recognize any treaty or agreement between these .governments or agents thereof which might impair the treaty rights of the United States and that it did not intend to recognise any situation, treaty, or agreement brought about contrary to the covenants and obligations of the Pact of Paris of 1928 to which all the three, viz., China, Japan and U. S. A. were parties. He observed that a situation brought about in violation of International Law could not be legalised by the act of recognition. He further observed: "a caveat will be placed upon such actions which, we believe, will effectively bar the legality hereafter of any title or right sought to be obtained by pressure or treaty violation." This principle was given effect to by the League of Nations in its resolution of March 11, 1932, which declared; "It is incumbent upon the members of the League of Nations not to recognise any situation, treaty or agreement which may be brought about by means contrary to the Govenants of the League of Nations or to the Pact of Paris."

The doctrine is merely a statement of national policy, and although the principle contained in it was recognised by the League of Nations, when it passed in March, 1932, a resolution to the following effect:

"It is incumbent upon the members of the League of Nations not to recognise any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris,"

it acquiesced in the Italian conquest of Abyssinia in 1936 and in the Nazi conquest of Austria in 1938. After the conclusion of the Second World War, Great Fowers have refused to recognise changes brought about in contravention of the United Nations Charter. In pursuance of the above the United Nations General Assembly condemned in December, 1956, the Soviet Union for violation of the Charter in depriving Hungary of its liberty and independence and the Hungarian people of the exercise of their fundamental right.

The Tobar Doctrine.—This doctrine is associated with the name of the Minister of Foreign Affairs of Ecuador, Tobar, who, in 1907, declared that indirect intervention by the American States in the affairs of any other American State in the form of refusal to recognise a government which came to power as a result of civil war or revolution was both permissible and legal. Under the garb of this doctrine the United States, keeping in view political expediency, used recognition as a means of interfering in the domestic affairs

<sup>1. (1941) 3</sup> K. B. 532. 2. (1826) I Peters 511, 542.

<sup>3. (1943) 137</sup> F. 2nd 898.

of the Latin American countries. The doctrine did, however, not prevent the United States recognising governments which had come to power through U. S.—organised coups.<sup>1</sup> The doctrine, besides being unsustainable on legal grounds, runs counter to the Estrada doctrine discussed below.

The Estrada Doctrine.—The Estrada doctrine pleads for the abolition of the practice of recognition in some form. On September 27, 1930, Senor Genaro Estrada, Secretary of Foreign Relations of Mexico, issued a declaration, which has since been known by his name, in the following terms:

"...The Government of Mexico has transmitted instructions to its Ministers...in the countries affected by the recent political crisis, informing them that the Mexican Government is issuing no declarations in the sense of grants of recognition, since that nation considers that such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governmets, inasmuch as the latter assume, in effect, an attitude of criticism, when they decide, unfavourably, as favourably or the legal qualifications to foreign regimes. Therefore, the Government of Mexico confines itself to the maintenance or withdrawal, as it may deem advisable, of its diplomatic agents, and to the continued acceptance, also when it may deem advisable of such similar accredited diplomatic agents as the respective nations may have in Mexico; and in so doing, it does not pronounce judgment, either precipitately or a posteriori, regarding the right of foreign nations to accept, maintain or replace their governments or authorities."

Briggs observes that although the Estrada Doctrine looks to the abolition of the practice of recognition of governments rather than the proposed establishment of a legal right to recognition, neither proposal succeeds in eliminating the political factor since, in the former case, it will be necessary to decide with what officials foreign diplomats may deal in fulfilling obligations or claiming rights under International Law, and, in the latter, to what regime the alleged duty of recognition is owed and why.

Referring to Estrada Doctrine of recognition, Fenwick observes that if it is to be "interpreted as seeking the elimination of the subjective test of the ability and willingness of a new government to observe the international obligations of the State, so that recogition would be accorded, or rather diplomatic relations would be maintained uninterrupted, with a de focto government on the assumption that as a government it must of necessity carry out the international obligations of the state, the doctrine is not far removed from the earlier statements of the policy of the United States where the entire emphasis was put upon the de facto character of the Government. On the other hand, as a matter of practice, new governments coming into power in the American States, have never made any difficulty in proclaiming their intention to observe the obligations of International Law, one of which is the observance of the good faith of treaties.<sup>1</sup>

H. W. Briggs: The Law of Nations 2nd Ed., pp, 123-I24.
 Fenwick: International Law, 3rd Ed., p. 171.

Law, p 124.

"The Estrada of Doctrine of recognition," observes Svarlien, "clearly assumes that diplomats are accredited to states rather than to governments It also recognises the clear proposition of International Law that states have a continuous existence, whereas governments do not."1

Retroactivity of Recognition .- When a government which originates in revolution or revolt is recognized by a State as the de jure government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.2 It was observed in the Civil Air Transport Incorporated v. Central Air Transport Corporation3 that primarily, retroactivity of recognition operates to validate ster acts of a de facto goverument which has subsequently become the new de jure government, and not to invalidate acts of the previous de jure government.

The subject of retroactivity of recognition was discussed by the Supreme Court of the United States in Guaranty Trust Co. of New York v. United States,4 and it was observed: "The Government argues that recognition of the Soviet Government's action which for many purposes validated here that Government's previous acts within its own territory operates to set at naught all the legal consequences of the prior recognition by the United States of the Provisional Government and its representatives, as though such recognition had never been accorded ...... But it does not follow that recognition renders of no effect transactions here with a prior recognized government in conformity to the declared policy of our own government. The very purpose of the recognition by our Government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are. If those transactions, valid when entered into, were to be disregarded after the later recognition of a successor government, recognition would be but an idle ceremony, yielding none of the advantages of established diplomatic relations in enabling business transactions to proceed, and affording no protection to our own nationals in carrying them on." It was accordingly held that the recognition of the Soviet Government left unaffected those legal consequences of the previous recognition of the Provisional Government and its representatives, which attached to action taken here prior to the later recognition.

When the country recognizes a government of a foreign country as bein the government, the recognition dates back to the time when that governg ment became the effective de facto government. In the case of Aksionairnoye-Obshestvo A. M. Luther v. James Sagar and Co.5 the Foreign Office in England said in their certificate: "We recognize the Soviet Government as the government of Russia." They were asked for more details, and they said : "Well, we recognized originally the Provisional Government, which was the Kerenski Government. In 1917 that government was displaced by what is now called the Soviet Government." It was held on those statements of fact

<sup>1.</sup> Svarlien: Introduction to the Law of Nations, p. 102.

Oetjen v. Central Leather Co. (1918) 246 U. S. 297, 302.

<sup>(1952) 2</sup> All E. R. 733.

<sup>4. (1938) 304</sup> U. S. 126, 140.

<sup>5. (1921) 3</sup> K. B. 532.

from the Foreign Office that the recognition dated back to 1917 or thereabouts; in other words, to the time when the government which was recognized became over Russia the effective de facto government. The general principle is just that, when we recognize a foreign government we recognize it back to the time when it became, over the area concerned, the effective government, and it follows from that that we recognize the acts which it has carried out in the whole of that period: Boguslawski v. Gdynia-Ameryka Linie.

In the ordinary way of course, the British courts do give retroactive effect to the recognition of a government, in that they recognize the acts of that government within its proper sphere to have been lawful, not merely from the time of recognition, but antecedently, from the time that it was an effective government. The reason for this retroactivity is that, just as they recognize the decrees of the government subsequent to recognition to have been lawful, so also they must recognize the prior decrees to be lawful, unless, indeed, they were to say that the government must re-enact those prior decrees all over again before they can have any validity in their eyes. That would be a work of supererogation and humiliation to which that government might reasonably object, and it would be inconsistent with the sovereignty which is involved in recognition: Bouguslawski v. Gdynia-Ameryka Linie.<sup>2</sup>

The retroactive effect must, however, be confined to acts of the government within its proper sphere, that is to say, acts with regard to persons and property in the territory over which it exercised effective control: Banco de Bilbao v. Sancha³; or acts with regard to ships which are registered there and whose masters attorn to it: Government of the Republic of Spain v. S. S. Arantzazu Mendi.⁴ Just as the new government only gains its right to recognition by its effective control, so also the extent of the retroactinity is limited to the area of its effective control.²

It seems to me, however, observed Lord Morton of Henryton in Gdymia-Amer ka Linie etc. v. Boguslaw!ks, which was an appeal from the judgment of the Court of Appeal to the House of Lords, that no principle of retroactivity can come into operation in the case of a certificate which states in precise terms the moment "as from" which the new government became the recognized government of Poland.

[The certificate issued by the Foreign Office excluded any possible retroactive effect by stating (1) that up to a particular moment of time His Majesty's Government recognized the old Polish Government as being the government of Poland; (2) that as from that moment of time His Majesty's Government recognized the new Polish Government as the government of Poland, and (3) as from that moment ceased to recognize the old Polish Government.]

Methods of Recognition.—Recognition de facto or de jure is accorded in any of the following ways:

- I. By entering into a treaty;
- 2. By admitting to membership of the United Nations;
- 1. (1950) 1 K. B. 157: 7 B. I. L. C. 469.
- 2. (1951) 1 K. B. 162: 7 B. I. L. C. 480. 3. (1938) 2 K. B. 176.
- 4. (1939) A. C. 256.
- 5. (1953) A. C. 11: 7 B. I. L. C. 499.

- 3. By exchanging, sending or receiving diplomatic representatives;
- 4. By declaration, unilateral or collective;
- 5. By admitting to an international Congress; and
- 6. By the formal appointment of its consul.

Withdrawal of Recognition-The de jure recognition of a State is irrevocable, but it was resolved by the Institute of International Law in 1936 that such recognition ceases to have its force in case one of the essential elements of statehood obtaining at the moment disappears. Such a possibility of withdrawal is, therefore, not completely out of view, but it would be a disputable point whether the recognised State has or has not lost the necessary elements of statehood. A State may lose its independence, a government may cease to be effective or a belligerent party in a civil war may be defeated. In all these events withdrawal of recognition is permissible. The act of withdrawal on the part of the recognising State can, however, be inferred from its granting de jure recognition to the rival government. This is clear from the act of the British Government when in 1938 it gave de jure recognition to the annexation of Abyssinia by Italy, thereby withdrawing its recognition of Abyssinia as an independent State. Again in 1939 it recognized the revolution ary Government of Spain and withdrew its recognition from what had till then been the de jure Government of Spain.

Withdrawal of recognition when practised for some ulterior political purpose is tantamount to breaking off of diplomatic relations.

Consequences of Recognition.—Oppenheim sums up the consequences flowing from the recognition of a new Government or State in these words:

- (1) It thereby acquires the capacity to enter into diplomatic relations with other States and to make treaties with them;
- (2) Within limitations former treates (if any concluded between the two States, assuming it to be an old State and not a newly-born one are automatically revived and come into force;
- (3) It thereby acquires the right, which, at any rate according to English Law, it did not previously possess, of suing in the courts of law of the recognizing State;
- (4) It thereby acquires for itself and its property immunity from the juri sdiction of the courts of law of the State recognizing it;
- (5) It also becomes entitled to demand and receive possession of property situate within the jurisdiction of a recognizing State, which formerly belonged to the preceding Government at the time of its supersession, and
- (6) Where the revolutionary or de facto government of a country has been recognised by the government of a foreign State, a subject of such foreign State may safely contract with that de facto government; and if, by subsequent revolution, the previously existing government of the country is restored, the restored government is bound by International Law to treat any such contract as valid: Republic of Peru v. Dreyfus Brothers & Co.

(7) Recognition being retroactive and dating back to the moment at which the newly recognized Government established itself in power, its effect is to preclude the courts of the recognizing State from questioning the legality or validity of such legislative and executive acts, past and future, of that Government as are not contrary to International Law; it therefore validates, so far as concerns those courts of law, certain transfers of property and other transactions which before recognition they would have treated as invalid.

It may be added that recognition is not intended to sanctify every act, past and future, of a foreign government. The withholding of recognition may cast a mantle of disfavour over a government. But it does not necessarily stamp all of its acts with disapproval or brand them unworthy of judicial notice. Our executive, it was observed in 1952 by the United States District court in Bank of China v. Wells Fargo Bank & Union Trust Coy.1, on occasion, has even entered into treaty with an unrecognized government.

Disabilities of Unrecognized State. - The legal disabilities of an unrecognized State or Government are as under:

- (1) It cannot sue in the Courts of a State which has not accorded recognition to it. It was observed in the Russian Socialist Federated Soviet Republic v. Cibrario2 that a foreign power brought an action in American Courts not as a matter of right. Its power to do so was the creature of comity and until such Government was recognized by the United States, no such counity existed. A judicial court cannot take notice of a foreign government, not acknowledged by the government of the country, in which that court sits; and the fact of acknowledgment is a matter of public notoriety: The City of Berne in Switzerland v. The Bank of England.3
- (2) Its representatives cannot claim immunity from legal process in a foreign State.
- (3) It does not acquire the capacity to enter into diplomatic relations with other States and to make treaties with them.
- (4) Property due to an unrecognized State may actually be recovered by the representatives of the overthrown regime.

Recognition and the League.—It was agreed that the admission of a State to membership of the League of Nations implied its recognition. In 1935 it was held by the Commercial Tribunal of Luxemburg in the case of Soviet Union v. Luxemburg and Saar Co. that the admission of Soviet Russia to the League of Nations implied the recognition of the Soviet Government by Luxemburg. But this rule was not uniform.y adhered to, and Switzerland and Belgium refused to recognize the Government of Soviet Russia even after its admission to the League. It can, however, be asserted without any fear of contradiction that the States voting for admission of a State hitherto unrecognized, impliedly grant its recognition although an express rule will be necessary for the States voting against admission that once a State is admitted to the Organization it should be deemed to possess the required attributes of statehood or of governmental capacity.

Recognition and the U. N. O .- According to Article 4 of the Charter of the United Nations membership in the United Nations is open to peaceloving States which accept the obligations of the Charter. Such admission takes place by a decision of the General Assembly upon the recommendation

<sup>1. 104,</sup> Supp. 59.

 <sup>2. 235</sup> New York Court of Appeals, 255.
 3. (1804) 9 Ves. Jun 347

Annual Digest (1935-1937), Case No. 33.

of the Security Council. The question arises whether an unrecognized State can be admitted to the membership of the United Nations. The short answer is that recognition de facto or de jure is itself accorded by admitting a State to membership of the United Nations. The moment a State is admitted to membership of the United Nations—whether recognised by other States or not—it ipso facto becomes subject to all obligations imposed by the Charter and the general principles of International Law. The admission of a State to the membership of the United Nations by the General Assembly upon the recommendation of the Security Council amounts to a collective recognition by all the States, being members of the U. N. It embodies the collective desire of the States concerned. However to remove any ambiguity it is desirable that an express provision be adopted by the International Law Commission that an admission to the United Nations is in itself sufficient evidence of the possession of the required attributes of statehood and shall be binding even on the State voting against admission.

With regard to withdrawal of such recognition Article 6 of the Charter provides for the expulsion of a member of the U. N. for persistently violating the principles of the Charter.

## Recognition of Belligerency and Insurgency

Belligerency.—On the outbreak of rebellion or insurrection in any country the outside powers generally maintain an attitude of non-interference in the domestic affairs of that State. However, it may frequently render it not possible for other States to maintain an attitude of indifference either because the rebellious forces are in effective occupation of a large part of the territory of the parent Government or the actual war between the parent Government and the rebellious forces has reached a stage when outside powers will not treat it merely an internecine struggle! The disturbed State and outside powers may be so intimately connected with each other either on account of the situation of the country or trade or commercial relations that a civil war in one country necessarily entails its consequences on the other. In such cases the political communities struggling to attain a condition of separate statehood are accorded a de facto recognition of belligerency pending the determination of the question whether they are formally admitted to membership or are formally brought back to subjection.

(The recognition of belligerency is merely an assertion of fact that the rebels are in a position to exercise authority over the territory in their possession. It gives no cause for any offence to the parent State; nor is this recognition a violation of neutrality.)

The British practice is that the mere declaration by rebels that they have constituted a Provisional Covernment is not sufficient to justify belligerent recognition unless the insurgent forces have gathered sufficient strength and the newly constituted "Government" is capable of maintaining international relations with foreign States. The recognizing State becomes entitled to neutral rights, which are respected by rival parties. Such recognition protects the belligerents from being treated as traitors on land or pirates on the sea. It also grants immunity to the parent State for acts of omission and commission on the part of the belligerents detrimental to the recognising State.

Recognition of belligerency confers an international status to the belligerents for purposes of war. Although there is no exchange of embassy or the conclusion of a treaty, yet consuls are generally exchanged for the protection of commercial interests. The recognising State also recognizes within its jurisdiction the flag of the revolted Government and the Commissions it issues.

Recognition of belligerency is, however, different from recognition of a legitimate Government of the country. The former simply confers mutual benefits to the giver and the recipient of the rights of belligerency; but the latter is a completed act and carries with it the privileges of membership of international community.

Recognition of belligerency is a question for the Executive Department of the Government whose declarations are binding on the Court. Such recognition is a question of policy and not of law. It depends on various considerations, e.g., the existence of a civil war accompanied by a state of general hostilities; occupation of a substantial part of national territory by the insurgents whether the belligerent community has an organised Government capable of conducting military and naval operations in conformity with the laws of war; and whether the interests of the State conceding such recognition are being affected by the outbreak of war.

It was observed by the American Commissioner Nielsen in his dissenting opinion in the case of the Oriental Navigation Co. before the General Claims Commission between Mexico and the United States of America that the recognition of a state of belligerency so called, on the part of Governments, like that of the recognition of a new State, involves very largely political considerations and that the only kind of war that justifies the recognition of insurgents as belligerents is what is called 'public war'; and before civil war can be said to possess that character the insurgent must present the aspect of a political community or de facto power, having a certain coherênce, and a certain independence of position, in respect of territorial limits, of population, of interest, and of destiny. Furthermore, the interests of neutral States or their nationals must be affected before they are justified in granting such recognition.

The conferring of the status of belligerency on the insurgents is only for the purposes of warfare and confers no other rights. "It does not condemn acts against the Government not committed by armed force in the military service of the rebellious organization; it sanctioned no hostile legislation ....."

Recognition of belligerency has the effect of creating a new international entity possessing all the rights and obligations of independent States with respect to the conduct of armed conflict.1 The recognising State acting as a neutral accords the rights of belligerents to the warring parties, who acquire the right of admission of their ships into the port of the recognising State, the right to visit and search at sea, the confiscation of contraband goods and the maintenance of blockade. Such recognition enables the belligerent community and the parent State the same international status with respect to the prosecution of the war.

Belligerency rights are accorded as a matter of convenience to the donor as also to the recipients. After the belligerents have consolidated their position they are recognised as an independent State.

Insurgency.—It may, however, happen that a civil war may not reach a stage to call for the recognition of a formal condition of belligerency by outside powers. The rebellious forces may not be acting under the command of an organized authority or may not be following the established rules of warfare. In such circumstances third States may grant the rebels only "a precarious form of recognition", viz., the status of insurgents, refrain from

<sup>1.</sup> Jones v. United States, 137 U. S. 202.

treating them as law-breakers and consider them as the de facto authority in the territory under their occupation. They may maintain with these insurgents such relations as be deemed necessary for the protection of their nationals, for securing commercial intercourse and for other purposes connected with the host ilities.

The conditions essential for recognition of insurgency may be stated as follows: (1) It is necessary to see that the insurgents have gained control over a considerable part of the territory; (2) There is considerable support to the insurgents from the majority of the people inhabiting the territory. The support must be forthcoming out of their own free will and must not be the result of duress or compulsion; and (8) Lastly, the insurgents must have the capacity and be willing to carry out the international obligations imposed on them by the grant of insurgency.

The granting of the status of insurgency by a State protects the insurgents from being treated by it as pirates. It does not, of course, confer on the insurgents the status of a State with all the rights and privileges concomitant with it. Nor does it absolve the parent State from international torts for acts of insurgents which could have been prevented by due diligence.

The recognition of insurgency confers no belligerent rights such as blockade, on the contestants.1)

The recognition of the insurgents as belligerents leads, according to Garner, to the following consequences:

Both the contending forces acquire a new status on recognition of belligerency and certain additional rights which they did not have prior thereto, but the recognizing State itself acquires no new rights so far as its relations with the insurgents are concerned. Its duty changes from that of non-intervention on the side of the insurgents to that of neutrality in respect to both belligerents. It loses the right which it had during the period of insurgency to assist the legitimate government and henceforth must treat both belligerents alike. It can no more render aid to the former insurgents without violating the law of neutrality than it could have aided them before recognition without violating the law of non-intervention.

According to Schwarzenberger, the recognition of insurgency can be distinguished from the recognition of belligerency in the sense that the latter and not the former includes the recognition of belligerent acts of the revolutionaries on the high seas and in the air space above the high seas.

Co-belligerency.—During the First World War, the Allied Powers recognized the Czechoslovak and Polish National Armies as autonomous, Allied and Co-belligerent. The United Nations granted the right of co-belligerency during the Second World War to such of the Italian forces who were fighting with the United Nations against the enemy. In this capacity they had all the rights of armed forces of a recognised State. Co-belligerency in this sense conveyed the status of an allied nation short of a member of the United Nations. Recognition was also accorded to the Free French Movement led by against the Axis forces.

<sup>1.</sup> Moore, Digest 1, 184.

### CHAPTER XI

## STATE SUCCESSION

There is a succession of States where the territory of one State passes from its supremacy to that of another. The State the territory of which passes to another State is termed as the predecessor State, while the succeeding State is called the successor State. "A succession of International Persons occurs", says Oppenheim, "when one or more International Persons take the place of another International Person, in consequence of certain changes in the latter's condition."

A State may succeed another State by incorporating a certain portion of the latter's territory; it may be split up into two or more States, or new States may emerge out of the territory of a dismembered State as happened to the territory of the Austro-Hungarian Monarchy as a result of the First World War, or to the territory of German Reich as a result of the Second World War. A State may merge voluntarily into another by treaty, or its territory may be forcibly annexed by another or by several other States. The Gongo Free State lost its independence by merger with Belgium in 1908; Korea became part of Japan in 1910; Orange Free State and the South African Republic were conquered and absorbed by Great Britain in 1901. Part of the territory of a State may form part of the territory of a new State by treaty or part of an existing State may break off and become a new State, e. g., Dansi and the State of the Vatican City, or Pakistan. In other words, the succession of State implies the substitution of one State for another.

Succession is primarily a principle of private law, and involves political changes in the State.

Succession is either universal or partial.

# Universal Succession .- There is universal succession :-

- (i) when one State is completely absorbed by another as a result of annexation or conquest, e. g., the South African Republic was annexed by Great Britain in 1901, Korea by Japan in 1910 and Abyssinia by Italy in 1936;
  - (ii) when several States agree to merge into a Federal State or a Union; e. g., in 1871 the German States united together to form the German Empire; the merger of Egypt and Syria on the 22nd February, 1958, and later Yemen on the 2nd March, 1958, to form the United Arab Republic; or the merger of Iraq and Jordan on the 14th February, 1958, to form the Arab Federal State; and
  - (iii) when one or more States are formed or one or more International Persons take the place of another International Person by division of a former single State or International Person, each of the independent States being a successor State.

Partial Succession.—Partial succession takes place :

Oppenhet: International Law, 8th Ed., p. 157.

- (i) by succession, when another State is established by a part of the territory breaking off from the parent State and thereby gaining independence, e. g., the separation of the United States from the parent State Great Britain in 1776;
  - (ii) by cession or conquest, when one State acquires a part of the territory of another State and assumes sovereignty over the portion ceded, e. g., cession of California to the United States in 1847;
- (iii) by dismemberment, when a full sovereign State loses part of its independence through incorporation into a Federal State or coming under the suzerainty or protectorate of a stronger power or when a not full sovereign State, i.e., a suzerain or protectorate or even a member of a Federal State, becomes full sovereign, e.g., Czechoslovakia was dismembered in 1938 as a result of the Munich Agreement.

### Consequences of State Succession

The question whether the replacement of one International Person by another involves a succession to the rights and duties of the former or not, has not been free from doubt. Some writers maintain that with the extinction of an international person no rights can possibly survive; others are of opinion that devolution of rights and duties does follow upon the succeeding State. On account of the uncertainty of the International Law of succession, usually all possible contingencies are covered by treaties between the parties.

obligations to the successor State depends upon the nature of succession. In the case of universal succession where a State merges voluntarily into another State or where it is subjugated by another State, the successor State remains one and the same International Person, while the predecessor State which has merged or been subjugated becomes totally extinct as an International Person. Political treaties and alliances and rights and obligations accruing thereunder, in the absence of a substantial continuity of personality, become extinct and invalid and the successor State does not succeed to such rights and duties of the extinct State. Rights or obligations under multilateral conventions of universal application on health, technical and similar matters subsist and pass as happened in the case of Pakistan after separation from India in 1947 when she automatically became party to certain multilateral conventions of universal application binding India.

In the case of fusion or union of States, if it be merely the enlargement of the extinct State into a larger one, prior treaties continue to remain in force so long as they are not in conflict with the rights and obligations of the federal State. But if annexation be in the nature of absorption with the result that there is no division of sovereignty, treaty rights and obligations are extinguished, excepting State servitudes or casement rights which have to be respected by the successor State. "Servitudes", observes Dr. Reid, "establish a permanent legal relationship of territory, to territory unaffected by change of sovereignty in either of them, and terminate only by mutual consent, by renunciation on the part of the dominant State, or by consolidation of the territories affected."

<sup>1.</sup> Helen Dwigh Reid . International Servitudes in Law and Practice. 25.

In the case of several States combining to form a federal union, all treaties to which these States were parties extinguish. Similar result follows when there is formation of several States as a result of the dissolution of an old State.

Personal treaties relating exclusively to the persons of the contracting parties, e. g., treaties of alliance, arbitration or neutrality expire on the extinction of the family and no succession in respect thereof takes place. As regards treaties of commerce, navigation and extradition it all depends on the attitude of the annexing State as to whether it is prepared to follow the provisions of such treaties or prefers to repudiate the same. The consensus of opinion is that they are not subject to succession. It was held by the Supreme Court of the United States in Terlinden v. Ames that the extradition treaty made between the United States and Prussia prior to the formation of the German Empire continued to be operative after the union on the ground that the treaty had been officially recognised by Germany.

State succession in respect of law-making treaties—The traditional view is that a new member of the international community starts with a clean state in respect of treaty obligations, excepting with regard to treaties creating local obligations and existing rules of customary International Law. There is, however, a divergence of views in respect of the clean state rule among the text-writers. Kiatibian is of the view that treaties which have a character of general utility survive. They relate to postal, telegraphic and telephone conventions, the Geneva Convention on the care of the wounded, the Brussels Convention for the abolition of the slave trade, or the St. Petersburg declaration concerning explosive bullets.

Huber is of the view that in the case of a State formed by separation from an old one, all treaties pass over, even in the case of commercial treaties and capitulations, but not alliances and guarantees. Even in cases of conquest Huber considers that treatics pass over in theory.

On the other hand, there are writers who opine that there is overwhelming evidence to show that all treaties go by the board. Keith is of the view that no treaties are inherited by a conqueror or cessionary State but that all his treaties extend themselves over the conquered or ceded territory. When the new State formed by separation follows the same methods of action relative to a third party as its predecessor, it tacitly or expressly forms for itself a new treaty between new parties with the third party. On this view this treaty is a res inter alios acta. The new State cannot step into the treaties of its mother country or the conqueror into the treaties of its conquest.

McNair sums up the British practice thus: "It is believed to be the view of the United Kingdom Government that the general position governing the treaty position of truly new States is that newly-established States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor, start with a clean slate in the matter of treaty obligations.

Crandall summarizes United States practice thus: "A State formed by separation from another, whether the personality of the original State still exists or is completely lost by disintegrations, succeed to such treaty burdens of the parent State as are permanent and attached to the territory embraced in the new State."

The English writers Hall, Holland, Oppenheim and Brierly lean in favour of the clean slate rule, Westlake taking a contrary view. The American writers Wheaton, Taylor, Hershey and Fenwick favour the clean slate rule, while Kent, Field, Halleck and Woolsey take the opposite view.

As said above, treaties usually make provisions for such contingencies. When Burma was separated from India in 1937, it was agreed that Burma would be bound to continue to observe and apply all the International Labour Conventions in which she previously participated as part of India. The Indian Independence Order, 1947, also made provision for the apportionment of international rights and obligations as between India and Pakistan. Membership of all international organizations with all rights and obligations attaching thereto devolved solely upon India: rights and obligations having an exclusive territorial application to India or Pakistan devolved on the Dominion concerned; all other rights and obligations under International agreements devolved upon both Dominions.)

2. Membership.-It is settled that membership of the international organizations and the obligations incidental thereto do not pass to a successor State. The Irish Free State applied for its admission, and was admitted, to the League of Nations : Iceland did not inherit any part of the membership of Denmark and was admitted to International Labour Organization in 1944. India continued to be a member of the United Nations, and Pakistan was subsequently admitted to membership as a new State on September, 30, 1947. As regards the position in International Law of the two States evolved as a result of the bifurcation of India (a part of India breaking off and becoming a new State), there could be no change in international status of India. It continued as a State with all treaty rights, and obligations. Pakistan, as the territory which broke off, emerged as a new State having no treaty rights and obligations of the old State. The U. N. Assistant Secretary General observed on the question that in his opinion the situation was analogous to the separation of the Irish Free State from Great Britain and of Belgium from the Netherlands In these cases the portion which separated was considered a new State; the remaining portion continued as an existing State with all the rights and duties which it had before.

The Legal Committee of the General Assembly subsequently agreed that a member of the United Nations does not cease to be a member simply because its constitution or its frontiers have been subjected to changes and that when a new State is created by separation from a member of the United Nations it cannot under the system of the Charter claim the status of a member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.

A brief survey of the position will show that the law on the matter must be regarded as fluid. It was laid down by the Convention on Treaties adopted at the Sixth International Conference of American States at Havana in 1928 that treaties shall continue in effect even though the internal constitution of the contracting States has been modified and that if the organization of the State should be changed in such a manner as to render impossible the execution of treaties, because of division of territory or other like reasons, treaties shall be adapted to the new conditions. The Convention did not, however, provide for the obligations of new States.

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Change in constitution and frontiers of a State.—As a general rule it is in conformity with legal principles to presume that a State which is a member of the organization of the United Nations does not cease to be a member simply because its constitution or its frontiers have been subjected to changes, and the extinction of the State as a legal personality recognised by the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.

When however a new State is created, whatever may be the territory and the population which it comprises and whether or not they formed part of a State member of the United Nations, it cannot under the system of the Charter claim the status of a member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter. This view is in consonance with the statement made by the Legal Committee of the Ceneral Assembly in relation to the partition of India and Pakistan in 1947.

3. Public Property and Public Rights.—When one State succeeds de facto to another, it succeeds to all the public and proprietary rights of the extinct State. State property, State railways and fiscal funds pass to the annexing State. The successor State takes all the assets of the vanquished State, including such assets as State funds, funds invested abroad, movable and immovable property. It also acquires the right to collect taxes due to the replaced State. Succession to the rights of the extinct State exists with respect to such local matters as rivers, roads and railways, etc. The succeeding State has a right to the allegiance of those who were formerly subjects of the extinct State and remain on its territory.

The Permanent Court of International Justice held in the case of the Polish Upper Silesia Case (Merits)<sup>1</sup> that State succession to public property of the annexed or ceding State is a customary principle of International Law even in the absence of treaty. Referring to Art. 256 of the Treaty of Versailles, it observed: "The article in question, which relates to the transfer of public property as a result of cession of territory, must in accordance with the principles governing State succession—principles maintained in the Treaty of Versailles and based on considerations of stability of legal rights—be construed in the light of the law in force at the time when the transfer of sovereignty took place. Now at that time, the ownership of the Chorzow factory belonged to Oberschlesische and not the Reich."

The principle of succession to public rights of the replaced State also comprises the right to collect taxes due to the replaced State.

Private Property.—A cession of territory from one State to another, however, affords no title to the successor State to private property in the soil for succession increly refers to public rights of sovereignty and not to private proprietary rights. The private rights of the inhabitants, and their relations to each other unless specially altered by the conqueror, remain the same.<sup>2</sup>

In United States v. Percherman3 Chief Justice Marshall observed that seemse of justice and of right which is acknowledged and felt by the whole

S. v. Mareno, 1 Wallace, 531.
 Pet. 51, 86.

<sup>1. (1926)</sup> P. C. I. J. Ser. A. No. 7, p. 41.

civilized world would be outraged if private property should be generally confiscated. The people change their allegiance: their relation to their ancient sovereign is dissolved; but their relations to each other, and their

rights of property, remain undisturbed."

Private Rights.—In the German Settlers in Poland the Permanent Court International Justice observed in its advisory opinion: "Private rights acquired under existing law do not cease on a change of sovereignty. No one denies that the German Civil Law, both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be maintained that, although the law survives, private rights acquired under it have perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice.

"A cession of territory does not operate as a cession of the property belonging to its inhabitants."

It is a general rule of public law that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign.<sup>2</sup>

5. Contractual Liability. —There is a considerable body of authority among text-writers inclined to the view that the successor State is bound by the contracts of the extinct State. The new State becomes liable for all

local and contractual obligations.

The earlier view as laid down by an English Court in West Rand Central Gold Mining Co. Ltd. v. Rex\* that the sovereign of a conquering State was not bound by the obligations incurred by the conquered State has undergone substantial change, and modern practice has tended to modify the rigidity of this doctrine of non-succession. The Permanent Court of International Justice in the German Settlers in Poland Case,\* held that private rights acquired under existing law including those acquired from the State as the owner of the property are valid as against a successor in sovereignty, i. e., they do not cease on a change of sovereignty. The successor State is, however, justified in refusing to own the obligations of the ceded State which the latter incurred for the purpose of war against the former.

With regard to concessionary rights granted by the State before its extinction, they usually survive the extinction and bind the absorbing State. The successor State is obliged to respect the rights which were legitimately conferred by the predecessor on a foreigner. In the case of Mavrommatis Palestine Concession, the Permanent Court of International Justice held that the Administration of Palestine, which succeeded to a territory of Turkey, was bound to give effect to concessions granted by Turkey to a Greek subject for works to be carried out at Jerusal m. Such concessionary rights, can, however, be regulated and modified by the successor State within its legislative competence so far as it relates to aliens.

In the Sopran Koszeg Local Railway Co. Arbitral Awards, the arbitrators held

1. (1925) P. C. I. J. Series B. No 6.

L. R. (1935) 2 K. B. 391.
 P. C. I. J. (1923) Series B. No 6, p. 36.

6. 24 A J. I L. (1930), 164.

<sup>2.</sup> Chicago Rock Island & Pacific Rly. Co. v. McGlinn, 114 U. S. 542.

<sup>5.</sup> P. C. I. J. Series A. Nos 2 (1924) and 5 (1925).

that, in principle, the rights which a private company derived from a deed of concession could not be nullified or affected by a mere change in the nationality of the territory on which the public service concerned was operated.

Contracts, however purely personal to the extinct State, do notservive.

6. Public Debts.—There is great divergence of practice as regards the succession to public debts. The sounder view appears to be that it is purely a matter of discretion and the practice has varied greatly, although of late opinion has been gaining ground that the succeeding State assumes the public debts of its predecessor unless they relate to a purpose distinctly against the interests of the inhabitants of the territory transferred or contracted for financing of wars or other hostile undertakings against the successor State.

According to Hyde the moral obligation to accept burdens as well as benefits which finds expression in such 'voluntary' State succession provides a solid reason for the claim that practice should shape itself accordingly and evolve a rule of law stamping evasion with an illegal character.

Arrangements with respect to public debts are usually made in treaties. According to the provisions of the Treaty of Versailles (1919) the States to which German territory was ceded took over part of the German national debt constituted on the 1st August, 1914, on the basis of proportionality of benefits received and financial capacity.

When the State territory becomes the territory of several States the debts are proportionately taken over by the succeeding States by a prior agreement. In the Austrian Empire Succession Case<sup>1</sup> the Austrian Court affirmed the view that "according to the principles of International Law in cases in which a territory is ceded by o e State to another or when several States arise out of one State, the State acquiring the territory or the new States are bound to take over an appropriate part of the obligations of the former State in proportion to the assets which it or they have taken over and which have been state."

In the case of succession to public debts of a State which cedes part of a territory only but continues to exist, the question assumes greater difficulty. It was observed by Arbitrator Eugene Borel in the Ottoman Public Debt Arbitration on April 18, 1925, that "it is impossible, despite existing precedents to say that a Power which acquires territory by cession is legally obligated to assume a corresponding part of the public debt."

With the division of India into two independent States in 1947, both India and Pakistan became the successor States in relation to the former the division of assets and liabilities of the then Central Government. The division of the railways, telegraph lines, the post offices, the mints, etc., was Assets and Liabilities. The sterling balances of the Expert Committee on also rateably distributed between India and Pakistan.

Annual Digest, 1919-22 Case No. 39.

7. Torts.—The succeeding States, whether by conquest or voluntary absorption, are under no liability for the delicts of the extinct States. the case of Robert E. Brown Claim, after Great Britain had acquired the territory of South African Republics by conquest, the U.S. A. Government laid a claim with the British Government on behalf of Mr. Brown, who was an American citizen, for the deprivation of his mining rights by the Government of the Republic in South Africa before its conquest by Britain. It was conceded that the Government of the South African Republic had been responsible for a denial of justice. It was held by the American and British Claims Arbitration Tribunal in November 1923 that the liability for the tort did not pass to the British Government. The decision in Brown's case was followed in cases arising out of Burma's annexation by the British Government in respect of injuries sustained by foreigners at the hands of the former Burmese Government.

Sir Cecil J. B. Hurst referring to conquest and annexation observes that these "constitute an act of appropriation by force, the title of the annexing State is founded on might; the title to the property of the former Government rests upon the fact of physical control and the expressed intention to maintain Such property may never come within the power of the annexing State and to such property it gets no title. What the conqueror annexes is the territory of the former State, not the State itself, still less its government. When once this principle is realised, it will be seen that in sound theory it is impossible to hold the conqueror liable for the torts of the government which he has displaced, because the torts were the torts of the government and not the torts of the territory."2

Succession to property lying in foreign State. - The successor State may claim any State property in the territory over which it acquires sovereignty.

In the case of suppression of a revolt the parent State by virtue of its paramount title gets the property of the rebel Government lying within its territory as also property lying in foreign States which belonged to the parent State and was seized by the rebel Government. The parent State can also recover as the successor State the property lying in foreign States which was acquired by the rebel Government as a result of voluntary subscriptions.

Laws The civil law of the former sovereign continues unless changed by the successor State; public law, however, changes simultaneously with the transfer of sovereignty : Philippine Sugar Estates Development Co., Ltd. v. United States.3 Whatever public law continues to remain in operation after a territorial transfer derives its force as positive law owing to its acceptance by the acquiring State.

A conquered country is to be governed by such laws as the conquerer will impose; but until the conqueror gives them new laws, they are to be governed by their own laws, unless these laws are contrary to the laws of God, or are silent, for in all such cases the laws of the conquering country shall prevail : Anon.

10. Nationality.-As regards nationality the inhabitants of the ceded vanquished territory become subjects of the annexing State and lose citizenship of the former State. In the case of the acquisition of a part of

American Journal of International Law (1926), Vol. 20, p. 381.

2. Sir Cecil J. B, Hurst; International Law; The Collected Papers, pp. 79-80.

United States Court of Claims, 1904, 39 Ct. Cl. 255. 4. (1722) 2 P. Wms., 75; 2 B. I. L. C. 349.

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the territory of a State by another State, Article 18 of the Harvard Research Draft on Nationality provided that the nationals of the first State who continued their habitual residence in such territory lose the nationality of the State and become nationals of the successor State. The treaties often make provisions for this contingency. Usually a certain period of time is allowed to the inhabitants to elect for themselves as to which State they want to owe their allegiance. After the division of India an option to choose their nationality between India and Pakistan was given to the former citizens of pre-partitioned India.

Succession on suppression of revolt.—"Changes in the government or the internal policy of a State do not as a rule affect its position in International Law. A monarchy may be transformed into a republic or a republic into a monarcy: absolute principles may be substituted for constitutional, or the reverse; but though the government changes, the nation remains, with rights and obligations unimpaired...The principle of the continuity of States has important results. The State is bound by engagements entered into by governments that have ceased to exist."

In the case of a revolt in a State, where the rival Government is ultimately suppressed by the parent States, the question may arise as to who is entitled to the property of the suppressed government. As regards property within the territory of the parent State, no question of International Law is involved. As regards the property which formerly belonged to the parent State but was seized by the rebel Government in foreign States, the parent State can recover property, by an action in a foreign court by title paramount. Even the property acquired by the rebel government as a result of voluntary subscriptions, lawful seizures of prizes, etc., lying in foreign territory is recoverable by the parent Government by virtue of its rights as the successor of the rebel Government.

As regards liability for the debts and wrongful acts of the rebel government, the Mixed Commission appointed by the Treaty of Washington, 1871, held that the United States of America was not internationally liable for the del ts of the Confederacy, or for the acts of the Confederate forces. However sometimes a State may agree to pay for the damage done by revolutionary forces. This was provided in a treaty between Great Britain and Mexico in 1926.

The parent government may be held responsible for the debts of the rebel government if the proceeds were utilised for the benefit of the State, but, if the creditor State had knowledge that the displaced government would not be liable for any new treaty obligations if it happened to oust the rebel government, the displaced government on its re-establishment would not be bound by such debts.

Succession in case of dismemberment.—When a State is divided into several parts which become independent States or are annexed by surrounding States, the rules of succession applicable to the case of absorption of one State by another apply in full measure. Each succeeding State succeeds to the fiscal property and fiscal funds found on the part of the territory that it absorbs. The debts of the extinct State are taken over proportionately. Thus, when the real union between Sweden and Norway was dissolved in 1905, all treaties concluded by the Union devolved upon the former members, excepting those concluded by the Union for one member only.

<sup>1.</sup> Moore, Digest 1, 249.

Succession in International Organization.-"The question succession', observes Oppenheim, "in the field of international organization arises when a public international organ created for specified purposes is dissolved and another organization is created by treaty for an identical or similar purpose." After the Second World War, the League of Nations was replaced by the United Nations, the Permanent Court of International Justice by the International Court of Justice, the International Commission for Air Navigation by the International Civil Aviation Organisation, and the International Sanitary Bureau by the World Health Organization. "While as a rule" continues to observe Oppenheim, "the devolution of rights and competencies is governed either by the constituent instruments of the organizations in question or by special agreements or decisions of their organs, the requirement of continuity of international life demands that succession should be assumed to operate in all cases where that is consistent with or indicated by the reasonably assumed intention of the parties as interpreted in the light of the purpose of the organization in question."1

In the case concerning the International Status of South-West Africa", the International Court of Justice in its advisory opinion observed that the General Assembly of the United Nations was legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the mandated territory of South-West Africa, and that the Union of South Africa was under an obligation to submit to supervision and control of the General Assembly and to render annual reports to it. It was held that South-West Africa was still considered a territory held under the Mandate of December, 1920. The degree of supervision to be exercised by the General Assembly should not exceed that which applied under the Mandates system and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations. These observations were particularly applicable to annual reports and petitions.

In Legal Consequences for States of the continued presence of South Africa in Namibia (South-West Africa), the International Court of Justice in its advisory opinion of June 21, 1971, opined that it considered South Africa's presence in South-West Africa to be illegal and that by maintaining the present illegal situation and occupying the territory without title, South Africa incurred international responsibilities arising from a continuing violation of an international obligation.

19

Oppenheim . International Law, Vol, I, p. 168 2. (1950) I. C. J. Reports, 79.

#### CHAPTER XII

### INTERVENTION

What is intervention .- It is the inalienable right of every State to manage its affairs according to its own volition, to adopt the constitution it likes, to change it within the terms of the law when it so desires or to enter into alliances and treaties with other States. But, as Lawrence points out, sometimes it happens that another State, or a group of States, interferes with its proceedings and endeavours to compel it to do something which, if left to itself, it would not do, or refrain from doing something which, if left to itself, it would do. Interference of this kind is called intervention.1

Intervention is dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things.2

Mere friendly advice and general political influence do not strictly come under this term as the essential requisite of intervention, viz., use of force or a threat to use force is lacking in them. The interference must take an imperative form-it should be forcible or backed by the threat of force.

The "intervention" prohibited by International Law is usually defined as dictatorial interference by a State in the affairs of another State. A "dictatorial" interference is an interference by the threat or use of force... It is evident that general International Law does not prohibit intervention under all circumstances : forcible interference in the sphere of interests of another State is permitted as reaction against a violation of International Law.3

International Law generally forbids intervention in the affairs of another State, which in this particular connection means something more than mere interference and much stronger than mediation or diplomatic suggestion. To fall within the terms of the prohibition, it must be dictatorial interference, in opposition to the will of the particular State affected, and almost always, as Hyde points out, serving by design or implication to impair the political independence of that State. Anything which falls short of this is strictly speaking not intervention within the meaning of the prohibition under by International Law. 5

According to Jackson intervention is the dictatorial or imperative violation by one State of the independence of another.6 The essence of intervention is the force or the threat of force. It must, therefore, be distinguished from such peaceful acts of interference as Good Offices, Intercession, Media-tion, and Arbitration as none of them implies dictatorial interference or violation.

Intervention means the dictatorial interference of a State in internal or external affairs of another State. Mere friendly advice or general political influence do not therefore come under this term, which implies that the

1. Lawrence: The Principles of International Law, p. 119. 2. Oppenheim : International Law, Vol. I, 8th Ed., p. 305 Hans Kelsen: Principles of International Law, pp. 63, 64.
 Hyde: International Law, 2nd Ed. (1947) Vol. I, p. 69.

5. J. G. Starke: An Introduction to International Law, 7th Ed., p. 110.

6. S. Jacks p : A Manual of International Law, p. 18.

interference should take place by the use of violence or-at cast-a threat to use violence.1

According to Hall, there is intervention when a State interferes in the relations of two other States without the consent of both or either of them or when it interferes in the domestic affairs of another State irrespective of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it.1

Intervention is as a rule forbidden by the Law of Nations, implying as it does use of force or threat to use force and violation of territorial supremacy, it conflicts with International Law, and is justified only in certain cases, which will shortly be discussed. It is like war a matter of policy-a political phenomenon-rather than of strict law. The duty not to intervene in the internal and external affairs of another State received recognition in-Articles 1 and 3 of the draft Declaration on the Rights and Duties of States adopted in 1949 by the United Nations International Law Commission.

Provisions in the Charter.-Article 2, paragraph 4, of the Charter implicity prohibits intervention on the part of individual States when it ordains the members to refrain in the international relations from the threat or use of force against the territorial integrity or political independence of any State. International Law, however, permits intervention, as dictatorial interference by one State in the affairs of another State, "only as reaction of the former against a violation of its right by the latter. Such a doctrine is possible only if the bellum justum principle is recognised. For it is incompatible with the view that war, the most radical dictatorial interference in the affairs of another State, is not forbidden by general International Law,"5

Kinds of Intervention .- There are three different kinds of intervention, viz.,

- (1) Internal.—It is the interference by one State between disputing sections of the community in another State either for protection of the legitimate Government or the insurgents. In 1936, a member of States intervened in the Civil War of Spain. The interference on the part of the People's Republic of China in the affairs of the Republic of Korea in 1950 Ly providing aid to the North Koreans furnished another instance of intervention, Again, the intervention on the part of Russian forces in the uprising of Hungarian people in October 1956 was yet another instance of internal intervention.
- (2) External.—It is the intervention by one State in the relations generally of hostile relations-of other States. It is, in other words, an intervention in the foreign affairs of another State, such intervention being directed against hostile relations of such State. This kind of intervention is tantamount to the declaration of war. The entry of Italy in the Second World War siding with Germany against Great Britain provided an example of external intervention.
- (3) Punitive It is a punitive measure falling short of war and is in the nature of a reprisal for an injury suffered at the hands of another State. It is frequently carried out by stronger nations towards weaker nations, A

<sup>1.</sup> Alf Ross: A Text-Book of International Law, p. 185.

<sup>2.</sup> Op. cit. W. E. Hall, International Law. Hans Kelsen : Principles of International Law, p. 64.

pacific blockade to compel the observance of treaty engagements or to redress some breach of law affords an illustration of this type of intervention.

Grounds of Intervention—"Intervention", says Sir W. Harcourt, "is a high and summary procedure which may sometimes snatch a remedy beyond the reach of law. Nevertheless it must be admitted that in the case of intervention, as that of revolution, its essence is illegality, and its justification is its success. Of all things at once the most unjustifiable and the most impolitic is an unsuccessful intervention.

According to Prof. Brierly the strictly legal occasions of an intervention may be brought under three heads, viz., self-defence, reprisals and the exercise of a treaty right.

There are few interventions which can be justified by right and as such are not a violation by the intervening State of the independence of another. They are discussed below along with other grounds which may not afford a reasonable justification for intervention.

Self-Preservation.—The supreme interest of the State overrides law. The right of self-preservation is more sacred than the duty of respecting the independence of other States. A State has a right to interfere in the affairs of another State where the security and immediate interests of the former are compromised. Interventions, therefore, in order to ward off imminent danger to the intervening State are justified by the force of circumstances. The danger must be direct and immediate, not contingent and remote. The leading case of the Caro line sets out the principles that govern the doctrine of self-preservation. During the Canadian rebellion of 1837 the steamer Caro line had been used by the insurgents to send arms and men across the Niagara from America. The insurgents intended to descend on British territory from the American side of Niagara. The American Government made no effort to suppress an impending expedition. Some British troops crossed the river, seized the Caroline at a time when she was moored within American territory and set it adrift. The U.S.A. lodged a strong protest for the violation of her territory and urged that, for such an infringement of territorial rights, the British Government must show "a necessity of self-defence, instant, overwhelming and leaving no choice of means and no moment for deliberation" and that the Canadian authorities "did nothing unreasonable or excessive." Great Britain, however, could not justify her action on the basis of this test and had consequently to express regret at the incident, which was accepted by the United States.

Professor Hall justifies intervention on the ground of self-preservation by the menaced State when the adjoining State is too weak to prevent actual attacks upon its neighbour by its subjects, if it foments revolution abroad, or if it threatents hostilities which may be averted by its overthrow.

The question as to whether an act of self-help falls within the ambit of self-preservation or not is a difficult one. In the Cor fu Channel Case<sup>1</sup> the dispute was between Albania and the United Kingdom. The British Navy had swept the North Corfu Channel without obtaining the consent of the Albanian authorities after efforts to secure Albanian co-operation had failed. The International Court of Justice held that the acts of the British Navy in Albanian waters violated the sovereignty of the People's Republic of Albania.

 <sup>(1843)</sup> Parl. Papers, Vol. lxi; Pitt Cobbetts' Leading Cases, Vol. I, p. 162 5th Ed.
 I. C. J. Reports 1949, p. 4.

Notwithstanding the above observations of the Court intervention when not inconsistent with the provisions of the Charter affords a legal justification for use as a rule of International Law.

This topic has more exhaustively been discussed in the next chapter.

2. Enforcement of Treaty Rights.—A State is justified in interfering in the affairs of another State if the provisions of any treaty oblige the former to preserve the independence or neutrality of the latter. Such intervention does not violate any right of independence because the State that suffers has conceded such liberty of interference by treaty. The Treaties of London of the years 1831 and 1839 guaranteed the integrity and neutrality of Belgium, but the invasion of Belgium by Germany in 1914 led to the intervention of Great Britain in pursuance of treaty rights by declaring war on Germany. It was again in pursuance of the Treaty of London of 1863 that France, Russia and Great Britain who had guaranteed the independence of Greece, interfered in affairs of Greece in 1916 and re-established constitutional Government. Again, by the Treaty of Havana, 1903, Cuba agreed that the United States might intervene for the preservation of Cuban independence, the maintenance of a Government adequate for the protection of life, property etc. This right was exercised by the United States on more occasions than one.

Soviet Intervention in Hungarian Affairs.-In October, 1956, there was an uprising in the Communist Republic of Hungary, which developed into a repellion. Martial law was enforced in Hungary, and on October 24, 1956, the Hungarian Government asked the U. S. S. R. Government to consent to the introduction of Soviet military units stationed in Hungary under the Warsaw Treaty, to assist the Hungarian authorities in maintaining order and tranquillity in Budapest. Several days later, the U.S. S. R. Government, with the consent of the Hungarian Government, withdrew their forces from the Hungarian capital. Soon after the withdrawal, the rebels again had the upper hand and smashed factories, broke hospitals and set alight theatres and museums. The nationalist forces demanded the return of Mr. Nagy, former Premier of Hungary, ousted by the Stalinist element in the party. On October 30, the people of Hungary were promised by Imre Nagy, the Titoist Communist lender, who had taken the Government at the height of the lighting, a coalition Government of all democratic parties and free western style elections ending Hungary's nine years of absolute Communist rule. The Soviet troops, including armoured forces, poured into Hungary from Kussia and Rumama.

Janos Kadar, Deputy Prime Minister in the Nagy Government. The new of overnment asked the Soviet Union for assistance in repulsing the onslaught of the rebellious forces, in restoring order and normal living conditions in the country. The Soviet Government responded to this call. The Soviet delegate, D. T. Shepilov, observed in his speech to the General Assembly on November 19, 1956: "We could not but take into consideration that Hungary is bordering on the Soviet Union and that U. S. S. R. is linked to Hungary by the Warsaw Treaty of friendship and co-operation and mutual assistance uniting a group of States....."

The result was that the Hungarian pro-Soviet forces, assisted by Soviet army units, put the rel ellion down in a brief span of time.

On November 4, 1956, the United States submitted a resolution to the Security Council calling on the Soviet Union to desist forthwith from any form of intervention, particularly armed intervention, in the internal affairs of Hungary. The Soviet Union vetoed the resolution, whereupon the United States asked for the convening of an emergency session of the General Assembly.

The United Nations General Assembly called on the U.S.S.R. on November 9, 1956, to withdraw her troops from Hungary so that free elections could be held there under U.N. auspices. One of the resolutions reaffirmed the request made to the Secretary-General to continue his investigation through his representatives of the situation caused by foreign intervention and to report back as soon as possible.

It will appear that since the Second World War terminated Russian troops had been in occupation of Hungary, Poland and Rumania. By the Warsaw Pact, which had been evolved as an answer to the North Atlantic Treaty Organisation, in pursuance of common defence arrangements, the U. S. S. R. rightly claimed the right to have her troops stationed in Hungary. That pact provides for a joint command of the armed forces of the State signatories of the treaty, Hungary being one of such signatories. The preamble emphasises the desire of the contracting parties to establish a system of collective security in Europe based on the participation of all European States. Again, it will also appear that subsequently the other Government which was set up in Hungary invited Russian assistance to quell internal disturbances and the Soviet Government justified their action in helping the new Government. It may, however, he difficult to determine as to now far the regime calling for help is, in fact, the legitimate government.

ment of the State to intervene in its international affairs, the matter is not free from difficulty. It is as stated above, again highly controversial whether the invitation from the government could be legitimately regarded as from the lawful government in such cases.

The most conflicting intervention had been the involvement of the United States and other States in the Vietnamese conflict. Although many writers, notably American, have justified the United States' intervention in that conflict as a lawful intervention it couldnot be denied that the civil war in the present case had been sponsored, aided and promoted by the United States of America, much to the woe of Vietnamese. This intervention could be the outcome of the policy of maintenance of balance of power in that region.

3. Grounds of Humanity. Another justification for intervention is based on the ground of humanity. Lawnence observes that in the opinion of many writers such interventions are legal, but they cannot be brought within the ordinary rules of International Law, which does not impose on States the obligation of preventing barbarity on the part of their neighbours. The three Great Powers, Great Britain, France and Russia jointly intervened in the war between revolutionary Greece and Turkey on the ground of abominable atrocities committed in the war which had shocked the conscience of Europe. Citing an example Lawrence says that when in 1860 the great powers of Europe intervened to put a stop to the persecution and massacre of Christians in the district of Mount Lebanon, their proceedings were worthy of commend-

ation, though they could not be brought within the strict letter of the law. In the same way in 1878 Russia intervened on behalf of the Christian minorities while the Bulgarian atrocities were being committed. The persecution of the Jewish community during Hitler's regime evoked strong protests from several nations and was referred as a charge against the Nazi war criminals at the Nyremberg Trial.

Provisions in the Charter.—The Charter of the United Nations reaffirms faith in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. The General Assembly is enjoined by the Charter to assist in the realisation of human rights and fundamental freedoms for all without any distinction. The Economic and Social Council is also empowered to make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all. In short, it is the task of the U. N. to promote universal respect for, and observance of, human rights and fundamental freedoms for all. In view of the above provisions Oppenheim observes: "The Charter of the United Nations, in recognising the promotion of respect for fundamental human rights and freedoms as one of the principal objects of the Organisation, marks a further step in the direction of elevating the principle of humanitarian intervention to a basic rule of organised international society. This is so although under the Charter as adopted in 1945 the degree of enforceability of fundamental human rights is still rudimentary and although the Charter itself expressly rules out intervention in matters which are essentially within the domestic jurisdiction of the State."1

The policy of racial discrimination pursued by the Union of South Africa has been receiving the attention of the U. N. on a complaint made by India initially in 1946. On November 30, 1970, the United Nations General Assembly declared that any State practising racial discrimination should have no place in the United Nations. In a resolution the 127-nation body condemned Governments denying the right of self-determination to the people, especially affirmed the inalienable and imprescriptible rights of the people of Namibia to self-determination, national independence and the preservation of their territorial integrity.

The barbarities committed in East Bengal by the Government of Pakistan in the name of a united Pakistan following a civil war towards the end of March 1971 were unprecedented; and in spite of the loud proclamations of the United Nations, established with the pious object of saving succeeding generations from the scourge of war and establishing conditions under which justice tained, it did not take cognizance of the serious situation and Law can be main-Pakistan until the breaking out of war between India and Pakistan in the early part of December 1971, when also it completely ignored the basic cause of Bangladesh tragedy. The brutal and unprovoked killings by West Pakistani on the Prevention and Punishment of the Grime of Genocide, 1948.

an undoubted maxim of European diplomacy from the middle of the seventeenth century. The doctrine of the necessity of a balance of power, observes Fenwick, between the leading States as the basis of mutual self-protection do-

<sup>1.</sup> Oppenheim: International Law Vol. I 8th ed. p. 313.

minated the international relations of the nineteenth century. It was almost regarded as an essential condition of the maintenance of order and the preservation of liberty within the European system so that no State could be in a position to have absolute mastery and domination over others. The Crimean War of 1854 was undertaken by Great Britain and France with a view to protecting the Ottoman Empire for the maintenance of the balance of power among the States of Europe. Most of the interventions in the Balkan Peninsula should be regarded as interventions in consonance with the policy of balance of power.

The policy pursued by the western countries since the formation of the Bolshevik Russia furnishes many examples of intervention on the part of the former for the preservation of the balance of power. Such interventions, although not accompanied by direct or open threats and as such not constituting intervention in the strict sense, yet contained germs of threats in a veiled form.

Intervention on the ground of preservation of the balance of power has

been condemned by jurists of all ages.

5. Protection of persons and property.—Protection of the persons, property and interests of its nationals may provide justification for intervention. The necessity for protection may arise due to gross injustice or due to injury caused by unfair discrimination.

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its. subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights-its right to ensure, in the person of its subjects, respect for the rules of international law...Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant. In the Mavrommatis Polestine Concessions case, M. Mavrommatis, a Greek subject, had received in 1914 concessions from the Ottoman authorities in regard to certain public works to be constructed in Palestine. It was alleged by the Greek Government that since 1921 the Government of Palestine, and thereby the British Government as the Mandatory Power for Palestine, had refused to recognise his rights to their full extent. The Greek Government sought judgment to the effect that the British Government, in its capacity as Mandatory was bound to maintain the concessions, or to redeem them by paying reasonable compensation. The Permanent Court of International Justice held M. Mavrommatis had suffered no loss, the claim for an indemnity should be dismissed.

The principles enunciated above envisage two things: first, that the subject has suffered damage by an act committed by a foreign State, and that this act is contrary to International Law. International Law here relates to the Public International Law and not Private International Law which is virtually a national law dealing with rules regulating cases in which municipal laws of different States come into conflict. Such rules of conflict of laws do not become rules of international law proper unless incorporated in international treaties. Now a claim based on a breach of inter-State law can be agitated only on the international plane, for the act causing damage to a foreign subject constitutes a breach of International Law, the defendant

<sup>1.</sup> Mavrommatis Palestine Concessions Case, P.C.I.J. 1924). Series A, No. 2, p. 12.

State and the State whose subject has suffered damage by the act being parties to the treaty. Further, even in a case where the act causing the damage to the individual is not of itself a breach of International Law, the private individual near approach his own State for vindication on the ground that the local authorities of the delinquent State refuse to grant redress or are unable to provide for such redress due to their corruptness. And in such a case of denial of justice, it is a matter for the State to decide whether, for juridical or political reasons, the case shall be taken up on international plane or not; or in other words the intervening State shall espouse the claim of its subject or not.

The decision further emphasises that the State whose subject has been injured has a right to intervene only when the subject has been unable to obtain satisfaction through the ordinary channels. That is fair, because it by using the local remedies the subject of the intervening State—gets satisfaction for the damage accrued, the claim of the intervening State is without any foundation. The occasion for exhaustion of local remedies may however not arise where the remedies provided are ineffective or the local authorities

are notoriously corrupt or unfair to foreigners.

The purpose of the intervening State is ultimately to seek a sanction of the violated rule of international law either by a decision of an international tribunal condemning the delinquent State to reparation or damages or by the redress obtained by the injured foreigner by way of local remedies.

6. Intervention in Civil Wars.—With the establishment of the United Nations there is no justification for intervention by individual States in the civil wars of other States. The Charter of the United Nations imposes an obligation upon States to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. In 1945 the Soviet Union intervened in Iran by supporting the rebels in Azerbaijan and when the matter was referred to the Security Council it did not regard itself as precluded from taking cognizance of the dispute in view of paragraph 7 of Article 2.

7. Collective Intervention.—Collective intervention at the present time is in pursuance of the provisions of the Charter of the United Nations viz., the enforcement action under the authority of the United Nations

Security Council in accordance with Chapter VII of the Charter.

Other grounds.—These are interventions for checking illegal intervention, intervention against an immoral act, intervention to remove international nuisances and intervention to defend national honour or to protect the interests of nationals abroad.

Starke enumerates the following principal exceptional cases in which a

State has at International Law a legitimate right of intervention :

(a) collective intervention pursuant to the Charter of the United Nations, viz., the enforcement action under the authority of the United Nations Security Council, pursuant to Chapter VII of the Charter;

(b) to protect the rights and interests, and the personal safety of its

citizens abroad;

(c) self-defence, if intervention is necessary to meet a danger of an actual armed attack;

(d) in the affairs of a Protectorate under its dominion;

(e) if the State subject of the intervention has been guilty of a gross breach of International Law in regard to the intervening State, for example, if it has itself unlawfully intervened.

<sup>1.</sup> Stark e: An Introduction to International Law, Seventa Edit ion, pp. 111-112.

He, however, adds that the Vietnam conflict and the closely related affairs in April-May 1970 of the incursion of American forces into Cambodia (Khemer Republic) for the proclaimed purpose of destroying North Vietnamese and Vietcong millatary sanctuaries, have served to bring into focus some of the uncertainties in the existing rules of international law as to intervention. He suggests that the word 'involvement' seems more appropriate for such collaboration.

Oppenheim mentions seven reasons when a State may have a right of

intervention against another State, viz.,

(1) A State which holds a protectorate has a right to intervene in all the external affairs of the protected State.

(2) If an external affair of a State is the at same time by right an affair of another State, the latter has a right to intervene in case the former deals with

that affair unilaterally.

(3) If a State which is restricted by an international treaty in its external independence or its territorial or personal supremacy does not comply with the restrictions concerned, the other party or parties have a right to intervene.

(4) If a State in time of peace or war violates such rules of the Law of Nations as are universally recognized by custom or are laid down in lawmaking treaties, other States have a right to intervene and to make the

delinquent submit to the rules concerned.

- (5) A State that has guaranteed by treaty the form of government of another State, or the reign of a certain dynasty over the same, has a right to intervene in case of a change in the form of government or of the dynasty, provided that the treaty of guarantee was concluded between the respective States and not between their monarchs personally.
- (6) The right of protection over citizens abroad, which a State holds, may cause an intervention by right to which the other party is legally bound to submit.
- (7) Finally, the Covenant of the League of Nations provided, as does the Charter of the United Nations, for the collective intervention of the member-States for the purpose of restraining States which disturb the peace of the world by resorting to war or force generally or to threats of force in breach of the provisions of the Covenant. The Charter of the United Nations imposes upon the Organization the duty of ensuring that States which are not members shall act in accordance with its principles so far as this is necessary for the maintenance of international peace and security.2

Professor Brierly is of the view that the strictly legal occasions of an intervention may be brought under the following heads, viz., legitimate case of reprisal, protection of nationals abroad, self-defence and the exercise of a treaty right with the State concerned.3

J Prohibition contained in Charter.-Article 2, paragraph 4 of the Charter of the United Nations clearly condemns intervention as a measure of self-help when it provides that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. Even the United Nations as a collective body is precluded from intervening in mutters which are essentially within the domestic jurisdiction of any State. Article 4 of the Draft Declaration of the International Law Commission of the United Nations. 1949, also refrains a State from fomenting civil strife in the territory of another State, and prevents

1. Oppenheim: International Law, Vol. 1, 8th Ed., pp, 306.310.
2. Op. cit. J. L. Brierly The Law of Nations; 6th Ed., p. 402

the organisation within its territories of activities calculated to foment such civil strife.

The Monroe Doctrine.—The doctrine embodies a principle of American Policy declining any European intervention in political affairs of the American continent. Wen in 1823 the Russian Government, then still in possession of Alaska, attempted to exclude all but Russian ships from the north-western coast of America, and at the same time the reactionary "Holy Alliance" of Prussia, Austria and Russia, having just quelled the Spanish revolution, contemplated intervention in the newly-created South American republics, President Monroe in a Message to Congress on December 2, 1823, enunciated his famous doctrine in three parts:

- (1) "The American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonisation by any European powers.
- (2) "In the wars of the European Powers, in matters relating to themselves we have never taken any part, nor does it comport with our policy to do so.
- (3) "The United States had not intervened, and never would intervene, in wars in Europe; but they could not, on the other hand in the interest of their own peace and happiness, allow the allied European powers to extend their political system to any part of America and try to intervene in the independence of the South American republics......We should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety."

#### President Monroe continued:

".....with the governments who have declared independence and maintained it and whose independence we have, on great consideration and just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny by any European power in any other light than as the manifestation of an unfriendly disposition towards the United States."

The Monroe Doctrine, as observed by Oppenheim, is largely of a political, and not legal, character. It established a fundamental principle of American policy by declaring that there must be no territorial aggrandisement by any non-American power on American soil and also embodying the nonintervention by the United States in European politics. It asserted a claim of political hegemony by U. S. A. over the whole American continent, Throughout the nineteenth century it was regarded by the United States as a bulwark of national defence. In 1895 Great Britain refused to recognise the Monroe Doctrine, when she declined to agree to arbitration in a boundary dispute with Venezuela. The American Secretary of State boldly asserted that "the United States is practically sovereign on this continent and its fiat is law upon the subjects to which it confines its interposition." President Cleveland also stated in 1895 that "if a European power, by an extension of its boundaries, takes possession of the territory of our neighbouring republic, against its will and in derogation of its rights, it is difficult to see why to that extent such Eurpean power does not thereby attempt to extend its system of government to that portion of our continent which is thus taken." The Secretary of State Mr. Olney declared that the United States was practically sovereign and 'her fiat law' on the American continent. The matter was, however, settled in 1899.

On December 3, 1901, President Roosevelt explaining the Monroe Doctrine observed that it did not guarantee any State against punishment for misconduct provided the punishment did not take the form of the acquisition of territory by any non-American power.

The issue of Venezuela again figured in the year 1902 when Great Britain, Germany and Italy wanted to collect debts from Venezuela by the use of armed force. The U.S.A. did not intervene at that stage in view of the declaration of President Roosevelt of December 3, 1901, and the matter was settled by arbitration.

In 1904 President Theodore Roosevelt asserted that the Monroe doctrine entitled the United States to exercise an 'international police power' indicating that the erstwhile doctrine which started with a claim to veto European intervention in Latin-American countries was extended to a claim by the United States of an exclusive right to intervene in them herself.

In 1912 the United States reaffirmed her faith in this doctrine when she protested against the intended saie of the Magdalena Bay to a Japanese company. The facts were that an American company, named the Magdalena Bay Company, intended to sell a tract of land of over 400,000 acres, including the Magdalena Bay at Mexico, which it owned, to a Japanese company. On the matter being referred to the Department of State in Washington, the American Senate passed the following resolution: "When any harbour or other place in the American Continents is so situated that the occupation thereto for naval or military purposes might threaten the communications or safety of the United States, the Government of the United States could not see without grave concern, the possession of such harbour or other place by any corporation or association which had such a relation to another Government, not American, as to give that government practical power of control for naval or military purposes."

The proposed concession by Columbia to a British Syndicate in 1913 was objected to by President Wilson when he declared that the South American States must stop making such concessions, for if they were granted, foreign interests might dominate the internal affairs of the State granting them.

In September, 1919, President Wilson declared that the United States was determined to play the role of big brother to the Western Hemisphere under all circumstances.

The Monroe doctrine has played an important part in guiding American policy. Its historical evolution reveals the way America's political history has developed. And, as observed by Alf Ross, "in the course of time it has developed, besides its original negative content—the prohibition of European intervention—a corresponding positive side, a demand from the United States for the right to intervention in every conflict between an American and a non-American State. This policy has in recent times been increasingly contested on the part of South America."

After the First World War America's "good neighbour" policy towards other American States brought the Monroe Doctrine closer to its former objectives of 1823. And now by reason of recent inter-American regional security arrangements, it might seem as if the Monroe doctrine regarded as an affirmation of the solidarity of the American Continent, has been transformed from a unilateral declaration into a collective understanding of the American Powers. In this view, Article 21 of the Covenant of the League of Nations

1. Alf Ross . A Text-Book of International Law, p. 187.

<sup>2.</sup> Starke . An Introduction to International Law, 7th Ed., p. 115.

correctly referred to the doctrine as a regional understanding. But the Monroe doctrine, observes Starke, "has not been completely multilateralised. It still retains its unilateral significance for the United States Government, as indicated by the American 'selective' blockade of Cuba in October 1962, in order to forestall the further construction of, or reinforcement of, missile bases on Cuban territory."

In 1938 the Pan-American Conference in a resolution declared the principle of solidarity of America, the parties to the declaration affirming their determination to maintain those principles against all foreign intervention or activity that might threaten them.

In June, 1940, the American Government reaffirmed their stand when they informed the Government of Italy and Germany that in accordance with its traditional policy relating to the Western Hemisphere, the United States would not recognise any transfer and would not acquiesce in any attempt to transfer any geographic region of the Western Hemisphere from one non-American power to another non-American power.

In July, 1949, the Foreign Ministers of the American Republic met at Habana and declared that any attempt on the part of a non-American State against the integrity or inviolability of the territory, the sovereignty or the political independence of an American State, shall be considered as an act of aggression against all the American States. This was reaffirmed by the Convention on the Provisional Administration of European Colonies and Possessions in America when the various American States declared that any transfer or attempted transfer of the sovereignty, possession, or any interest in or control over colonies of non-American States located in the Western Hemisphere would be regarded by the American Republics as being against American sentiments and the principles and the rights of American States to maintain their security and political independence. In 1945 the Inter-American Conference on War and Peace reiterated the same.

In the civil war in Cuba, President Kennedy, in reply to Mr. Nikita Khrushchev's message calling on him to halt aggression against the Cuban Republic, observed in April 1961 that in the event of any military intervention by outside force in Cuba they would immediately honour their obligations under the inter-American system to protect their hemisphere against external aggression. It was in pursuance of this policy that President Kennedy announced towards the end of October 1962 a blockade of all ships carrying offensive weapons to Cuba following the preparation of Soviet missile bases there, and successfully prevailed upon the U. S. S. R. to dismantle them and to ship their equipment back to Soviet Russia.

The Conference at San Francisco, which drafted the Charter of the United Nations, was faced with a difficult task of reconciling the position of regional organizations such as the Union of American States in relation to the world organization. The difficulty has been overcome by the provisions contained in Article 51 recognizing the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations until such time as the Security Council has taken the measures necessary to maintain international peace and security. The Charter thus makes the Monroe Doctrine compatible with a universal system of collective security as enshrined therein.

Great Britain, Germany and Japan lately followed the policy that is reminiscent of the Monore Doctrine in their areas of influence. In 1928 Great Britain at the time of the signing of the Kellog-Briand Pact (Treaty for the Renunciation of War made it clear that there were certain regions of the world the welfare and integrity of which constituted a special and vital interest for her peace and safety and that she accepted the new treaty upon the distinct understanding that it did not prejudice their freedom of action in that respect.

Between the years 1934 and 1941 Japan attempted to claim a special position in China apparently on the analogy of the Monore Doctrine. In April, 1934, the Japanese Government announced that they would oppose any attempt on the part of China to avail herself of the influence of any other country in order to resist Japan, including any joint operations undertaken by foreign powers even in the name of technical or financial assistance which would enable them to acquire political influence. Such attempts on the part of Japan failed to receive recognition from other powers. Great Britain declared that it could not admit the right of Japan alone to decide whether any particular action constituted a danger to peace or not. The American Government refused to admit that any nation could, without the assent of the other nations concerned, rightfully endeavour to make conclusive its will in situations where there were involved the rights and legitimate interests of other sovereign States.

Great Britain and Germany also did not lag behind to emulate the broad principles of the Monroe Doctrine in their areas of influence. The former carried it to its logical conclusion by stating that the protection of the British Empire against any attack was a special duty cast upon Britain for her own self-defence.

The North Atlantic Treaty (1949) whereby the signatories have agreed that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all, the Six-power European Defence Community Pact (1952) bringing into being the Six-nation European army, the Nine-power European Defence Community Pact (1954), the Eight-power East European Treaty Organisation (1955) with a view to establishing a system of collective security in Europe and the Eight-power South East Asia Defence Organisation (1955) as a protection against aggression in South East Asia and the Sonth West Pacific, are the offsprings of recent times based on the idea of regional groupings that are savoury of the Monroe Doctrine.

Nehru Doctrine.—The Indian Prime Minister Sri Jawaharlal Nehru extended the Monroe Doctrine by the deduction from it of a corollary when he observed on July 26, 1955, in Parliament that the Portuguese retention of Goa was a continuing interference with the political system established in India. He added: "I go a step further and say that any interference by any other power would also be interference with the political system of India." He recalled the circumstances under which President Monroe gave notice to the European Powers in 1823 that the United States would regard as the manifestation of an unfriendly disposition to itself the effort of any European Power to interfere with the political syestem of the American Continent, and said that the size of the Portuguese foothold in India did not matter. If it was a foothold, "it is a foothold and it is interference and it is a possible danger for the future."

Significance of Monroe Doctrine.—Professor Brierly in emphasizing the significance of this doctrine observes:

"The Monroe Doctrine is a policy which the United States has followed in her own interest more or less consistently for more than a century, and in

itself is not contrary to International Law, though possible applications of it might easily be so. But it certainly is not a rule of International Law. It is comparable to policies such as the 'balance of power' in Europe, or the British policies of maintaining the independence of Belgium or the security of our sea-routes to the East, or the former Japanese claim to something like a paramount influence over developments in the Far East."

In the words of President Wilson: The Monroe Doctrine is not a part of International Law. It has never been formally accepted by any international agreement. It merely rests upon the statement of the United States that if certain things happen, she will do certain things.

The Drago Doctrine.—Reference may also be made to the "Drago Doctrine." There was a controversy over certain pecuniary claims of the subjects of Great Britain, Germany and Italy against the Republic of Venezuela. That matter not having been settled through diplomatic negotiations, Great Britain blockaded the Venezuelan ports on December 11, 1902. Venezuela thereupon offered the dispute to arbitration, but this offer remained unheeded. Germany and Italy later on joined Britain in the blockade. Claims of other States, including the United States, were also pending against Venezuela, but they did not employ any forcible measures.

On December 29, 1902, Luis M. Drago, the Foreign Secretary of the Republic of Agrentine, at a time when Venezuela had been pacifically blockaded by Great Britain and Germany on account of the pecuniary claims of the subjects of their countries, presented to the Department of State of the United States a proposition regarding collection of debts which has come to be known as the "Drago Doctrine." The proposition is: "The only principle which the Argentine Republic maintains, and which it would, with great satisfaction, see adopted, in view of the events in Venezuela, by a nation that enjoys such great authority and prestige as does the United States, is the principle, already accepted, that there can be no territorial expansion in America on the part of Europe, nor any oppression of the peoples of this continent, because an unfortunate financial position may compel some one of them to postpone the fulfilment of its promises. In a word, the principle which she would like to see recognised is that the public debt cannot occasion armed intervention, nor even the actual occupation of the territory of American nations, by a European power." In his note to the Government of the United States he further observed: "The recognition of a debt and the payment of its amount can and ought to be made by a nation without prejudice to its original rights as a sovereign unit, but the compulsory and immediate recovery of a debt by force at any given moment would mean the ruin of the weaker nations and the suppression by the stronger powers of a government with all its inherent possibilities.

Drago's objections were confined to use of armed force in the collection of public debts only. This view was incorporated in the first article of the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, approved by the Second Hague Conference, 1907, but was qualified by the addition that armed intervention could apply when the debtor either refused arbitration or failed to submit to the award. The article reads: "The contracting powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals. This undertaking is, however, not applicable when the debtor State refuses

or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any compromise from being agreed on, or, after the arbitration fails to submit to the a.v. d."

On the occasion of the dispute of Venezuela referred to above, President Roosevelt in his message to Congress said, "We do not guarantee any State against punishment if it misconducts itself, provided that punishment does not take the form of acquisition of territory by any non-American Power."

The "Drago Doctrine" is a corollary to the "Monroe Doctrine."

The Brezhnev Doctrine.—The Communist countries, notably the U. S. S. R.. have evolved a new socialist international law overriding the conventional law which takes into account new developments in international relations. Lenin first propounded this theory in February 1918 by stating that the interests of socialism are higher than the interests of the right of nations to self-determination.

The doctrine which bears the name of the author was propounded by L. I. Brezhnev, General Secretary of the CPSU at the Fifth Congress of the Polish Communist Party, on November 12, 1969, which affirms that when internal and external forces hostile to socialism attempt to turn the development of any socialist country in the direction of the restoration of the capitalist system, there is a threat to the security of the socialist commonwealth as a whole. This doctrine has received trenchant criticism from independent nations. The U. S. S. R's intervention in Czechoslovakia in August 1968 was deplored by all right-thinking people of the world, and only proved that, until a more equitable order was established, the smaller states would only serve as factors in the grand design of the super powers.

#### CHAPTER XIII

### DOCTRINE OF NECESSITY AND SELF-PRESERVATION

Its Justification for Violations of Territory.—From the earliest time it has been consistently held as a rule of International Law that a State has a right to violate the rights of another State in the exercise of the right of self-preservation. Such violations are, however, executed only in cases of necessity. Necessity, observes Grotius, creates a definite right and cannot be regarded as a more excuse. It was observed by the Secretary of State of the United States of America in the case of the Caroline (1837), already referred to: "Undoubtedly it is just, that, while it is admitted that exceptions to the rules of International Law, especially the principle of the territorial integrity of States growing out of the great law of self-defence, exist, those exceptions should be confined to cases in which the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation", and, further, the action taken must involve "nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it."

Wheaton observes that in the exercise of the means of defence "no independent State can be restricted by any foreign power." But another nation may by virtue of its own right of self-preservation, if it sees in these preparations an occasion for claim, or if it anticipates any possible danger of aggression, demand explanations.

Inherent Right.-The Secretary of State Frank B. Kellogg observed while negotiating the Briand-Kellogg Pact in 1928 that the right of selfdefence is, therefore, inherent in every sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in selfdefence.

Pitt Cobbett observes that "for certain purposes and within certain limits the principle of self-protection or self-defence is recognised in International Law, as in municipal law as a justification or excuse for certain forms of extra-territorial action which would otherwise be unlawful; and to this extent it may be said to possess the character of a legal rule or principle."

According to Senator Root: "It is well understood that exercise of the right of self-protection may, and frequently does, extend in its effect beyond the limits of territorial jurisdiction of the State exercising it. The strongest example probably would be the mobilisation of an army by another power immediately across the frontier. Every act done by the other power may be within its own territory. Yet the country threatened by the state of facts is justified in protecting itself by immediate war. The most common exercise of the right of self-protection outside State's own territory and in time of peace is interposition of objection to the occupation of territory, of points of strategic military or maritime advantage or to indirect accomplishment of this effect by dynastic arrangement."

Hall observes: "Even with individuals living in well ordered communities the right of self-preservation is absolute in the last resort. is so with States, which have in all cases to protect themselves.1

According to Brierly self-defence is a legal right, and as with other legal rights the question whether a specific state of facts warrants its exercise is a legal question.

Article I of the Draft Declaration prepared by the International Law Commission states that every State has the right to independence, and "thus the first concern of a State is undoubtedly the integrity of its personality, and its preservation the most fundamental right; for upon this all other rights

The German writer Norbert Gurke went to the length of asserting that only those nations and cultures could survive who had the will and strength to protect their freedom, and observed that International Law had taken from no nation the right to fight for self-assertion.

Case of The Danish Fleet (1870).—After the Peace of Tilsit (1807), the British Government being aware of an arrangement by which Denmark could be forced to declare war against Great Britain in aid of France, requested Denmark to deliver up her fleet to the custody of Great Britain, and on her refusal to do so the British Government in the exercise of self-defence shelled Copenhagen and seized the Danish fleet.

Case of Amelia Island (1817).—The Amelia Island belonging to Spain in 1817 had been seized by a band of buccaneers and its leader McGregor was preying indiscriminately on the commerce of the United States. Spain found herself unable to drive this band off, and President Monroe in the

1. W. E. Hall : International Law, 8th Ed., p. 65.

Svarlien : Introduction to the Law of Nations, p. 123.

21

exercise of self-defence sent a vessel of war to drive away the marauders and destroy their works and vessels.

First World War .- During the First World War in 1914 Germany violated the neutrality of Belgium and Luxemburg on the pretext of the doctrine of self-defence. Germany justified the violation of the permanent neutrality of Luxemberg, as well as of Belgiu n, on the ground that she was threatened by attacks from Russia and France on two sides and that her self-preservation demanded intrusion of her armies into Luxemburg and Belgium for a defensive blow at France. The German Chancellor justifying the stand before the Reichstag of served: "Our troops have occupied Luxemburg, and perhaps are already on the Belgain soil. Gentlemen, that is contrary to the dictates of International Law. It is true that the French Government has declared at Brussels that France is willing to respect the neutrality of Belgium as long as her opponent respects it. however, that France stood ready for the invasion. France could wait but we could not wait .......... Anybody who is threatened, as we are threatened, and is fighting for his highest possessions, can have only one thought-how he is to back his way through." This plea of self-defence was negatived by world opinion as it was Germany who declared war on Russia and France and she had no justification to attack France through Belgium.

Manchurian Dispute.—In the course of the Manchurian dispute between China and Japan in 1931 and 1932, Japan invoked the principle of self-defence in starting military operations against China. But the Assembly of the League held in agreement with the findings of the Commission of Enquiry that the Japanese action could not be regarded as a measure of legitimate self-defence.

Russian Invasion of Finland.—The attack by Russia upon Finland in 1939 was a measure of self-defence on the part of Russia in anticipating an attack by Germany notwithstanding the recently signed non-aggression pact between the two countries. Germany also proclaimed the right of self-preservation when in 1940 she invaded Norway, Denmark, Holland, Belgium, and Luxemburg.

American Neutrality.—Before actually participating in the Second World War the United States had been transferring destroyers to Great Britain and helping the Allies by the Lend Lease Act of 1941. For these acts of help to the Allies, which violated the rules of strict neutrality, America justified her act on the ground of self-preservation, inasmuch as he was of the view that the national cause of the United States was vitally menaced by the ostensible will for world domination on the part of Germany.

Affairs of Korea. The intervention on the part of the People's Government of China in the affairs of Korea in 1950 was also sought to be justified on the ground of self-preservation.

Invasion of Tibet.—On the same analogy China invaded Tibet in 1950, which cooked strong protests from India. But China defended the invasion on the ground that the crossing of the 38th parallel in Korea and the progress of the Allied troops at the border of Manchuria made it imperative for China to invade Tibet as a measure of security of her own existence.

The great defect of this doctrine, however, is that it provides a powerful instrument in the hands of unscrupulous States to violate the independence of smaller States and set the peace of the world at naught.

Provisions in the Charter.—Article 51 of the Charter of the United Nations secures to a member State the right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, but the measures taken by the member in the exercise of the right of self-defence have to be immediately reported to the Security Council. This right of self-defence continues until the Security Council has taken measures to maintain international peace and security. Such right of self-defence exists only in case of an armed attack and not where an attack is anticipated or unfriendly relations short of an armed attack exist.

The terms of Article 51 envisage both collective and individual self-defence, and this means, to adopt the language of Professor Oppenheim, "that a member of the United Nations is permitted to have recourse to action in self-defence not only when it is itself the object of armed attack, but also when such attack is directed against any other State or States whose safety and independence are deemed vital to the safety and independence of the State thus resisting—or participating in forcible resistance to—the aggressor."

The concept of collective self-defence has of late been introduced by the conclusion of various treatics, viz., Inter-American Treaty of Reciprocal Assis tance (1947), West European Treaty for Collaboration and Collective Self-Defence (1948), the Bagota Charter of the Organization of American States (1948), the North Atlantic Treaty (1949', the New European Defence Plan (1954), the South East Asian Treaty (1954), and the Warsaw Treaty (1955). The Inter-American Treaty of Reciprocal Assistance goes to the farthest extent of providing for self-defence not only against outside aggressors but also against member States. Aggression as defined in Art. 6 includes acts against the invoilability or the integrity of the territory or the sovereignty or political independence of any American State or any other fact or situation that might endanger the peace of America. It includes even danger to the peace of America by an act which may not necessarily be an armed attack. Article 5 of the North Atlantic Treaty provides that an armed attack against one or more of the parties in Europe or North America shall be considered an attack against them all; and each of them shall assist the attacked party, in exercise of the right of individual or collective self-defence, recognised by Article 51 of the Charter, by taking such action as it deems necessary including the use of armed force, to restore and maintain the security of the North Atlantic area. Such measures ta en shall immediately be reported to Security Council and will terminate when the Council has taken the measures necessary to restore and maintain international peace and security.

Conclusion.—A review of historical events reveals that there is no doubt that a right of self-defence exists under general International law. The right is clearly recognised in Article 51 of the Charter, which has been discussed earlier. The case of the Caroline (1837) clearly establishes that violations of the territories of other States on the part of the endangered State in its self-preservation only are excused. Oppenheim observes that if an imminent violation, or the continuation of an already commenced violation, can be prevented and redressed otherwise than by a violation of another State on the part of the endangered State, this latter violation is not necessary, and therefore not excused and justified. Thus whatever may have been the true view of the initial use of force by the Japanese in Manchuria in 1931, observes Brierly, it was impossible to regard their later operations as measures of defence.

Article 51 of the Charter restricts the right of self-defence to the case of an "armed attack against a member of the United Nations", and to the time

<sup>1.</sup> Oppenheim: Internat ional Law, Vol. 2, 7th Ed., p. 155.

until the Security Council has taken the measures necessary to maintain international peace and security. Professor Brierly observes that "it is not a question on which a State is entitled, in any special sense, to be a judge in its own cause. In one sense a State in International Law may always be a judge in its own cause, for, in the absence of a treaty obligation, it is not compulsory for a state to submit its conduct to the judgment of any international tribunal. But this is a loose way of speaking. A State which refuses to submit its case does not become a 'judge'; it merely blocks the channels of due process of law, as, owing to the defective organization of international justice, it is still able to do. This is a defect of general application in International Law, which applies, but not in any special sense, to a disputed case of self-defence."

Even the Charter of the United Nations does not define the concept of "armed attack", its interpretation being left to the States concerned, until the Security Council intervenes. The reason of the thing, observes Oppenheim, makes it necessary for every State to judge for itself, in the first instance, whether a case of necessity in self-defence has arisen. The legality of such action is often referred to the Security Council or the International Court of Justice. It was held by the International Court of Justice in the Corfu Channel Case that the acts of the British Navy in Albanian waters violoted the sovereignty of the People's Republic of Albania. Accordingly the refusal on the part of the State concerned to abide by the decision of the Security Council or the International Court of Justice must be "deemed to be prima facie evidence of a violation of International Law under the guise of action in self-preservation." It is, therefore, clear, as Professor Brierly observes, "that the defensive character of any State's action is universally regarded as a question capable of determination by an objective examination of the relevant facts."<sup>2</sup>

## CHAPTER XIV

# STATE TERRITORY

State territory is that portion of the earth's surface over which a State exercises supreme and exclusive sovereignty. It comprises land territory, territorial waters, national waters, and air-space over the territory as also the subsoil underneath. According to Kelsen "the territory of the State is a space within which the acts of the State, and especially its coercive acts, are allowed by general International Law to be carried out, a space within which the acts of a State may legally be performed." According to Svarlien, "the territory of a state is composed of all the land and water-surface within its boundaries and jurisdiction, all the earth and water below this surface, and all the air above it." In an earlier chapter it has been stated that a State must have a defined territory, that being its essential element without which no State can exist. Within this territory the authority of the State is supreme. Within this geographical limit that State is the master of its own household. Wandering tribe is not a State until it has settled down and acquired a territory.

Limitations of Territorial Sovereignty.—Ordinarily the territorial sovereignty of State is indivisible, but there are exceptions to this general rule. In the case of condominium the territory is shared by two or more

<sup>1.</sup> Brierly: The Law of Nations. 5th Ed., pp. 319-320.

Hans Kelsen . Principles of International Law, p. 209.
 Sv rlien : An Introduction to the Law of Nations, p. 155.

powers, and sovereignty is divided between the several States. Again, in certain cases one State may actually exercise sovereignty, with the consent of the owner State which in law is vested elsewhere. The Islands of Crete and Samos, although enjoying wide sovereignty were still under Turkish sovereignty in 1913 as was held by the Fermanent Court of International Justice in the case of the Lighthou es in Crete and Samos. Another illustration is to be furnished from the treaty of August 6, 1914, placing New Hebrides under the condominium of France and England. Moreover in certain cases a piece of territory may be leased or pledged by the owner-State to a foreign State. Leases of small pieces of territory in 1941 by Great Britain to the United States for the use and operation of naval and air bases in Newfoundland, Bermuda, Jamaica, etc., afford another example of the divisibility of territorial sovereignty of a State. The United States-Japanese Security Pact of February, 1952, which granted the United States permanent use of some bases in Japan and provided for the United States service courts to retain exclusive jurisdiction over United States personnel and their dependents militatae against the unrestricted sovereignty of Japan. Again, sometimes sovereignty over a territory may be exercised in trust by another State because that territory is inhabited by backward communities who have not attained a measure of self-government, c. g., a mandated territory or the system of international trusteeship. Sovereignty may also be divided between a Federal State and the member-States. Lastly, the tional concept of sovereignty implying unrestricted self-determination has undergone a rapid change, The formation of blocs in the earlier decades between the Russian directed East Europe and the American-inspired-West and now the conduct of international relations between major and smaller powers-tended to convert the system of isolated State individualities into groups based on mutual economic, military and political co-operation, largely curtailing the unrestricted self-determination of a State falling in either of the two bloces in its external affairs.

Territory.—As said above, the territory of a State, in the first place, consists of the land within its boundaries. In the second place, it consists of its internal waters, like lakes, canals, rivers, ports and harbours. In the third place, it consists of its territorial waters containing a maritime belt of coastal waters, to a width of three miles measured from the low water-mark. In the fourth place, it consists of the air space above its territorial land and water, subject to the limitations d scussed below.

Boundaries.—They demarcate the territory of one State from that of another and constitute part of a State's title to territory. According to Jones, "A boundary is not merely a line but a line in a borderland. The borderland may or may not be a barrier. The surveyor may be most interested in the line. To the strategist, the barrier or its absence is important. For the administrator, the borderland may be the problem, with the line the limit of his authority." The boundary may be natural or artificial. The natural boundaries consist of rivers (such as river Ravi separating the boundaries of East Punjab and West Punjab forming part of India and Pakistan respectively), mountains (such as the Himalayas which protect India's border), deserts, forests and the like. The artificial boundaries are the imaginary boundary lines constructed for the purpose of dividing territories. They may consist of walls, pillars, poles, etc. About half of the boundary line between the U.S. A. and Canada is an artificial line running the 19th parallel. The boundary line dividing North from South Korea runs along the 38th parallel.

Disputed boundaries have occasioned many international or inter-State arbitrations. The Alaska Boundary Arbitration of the year 1903 between the

<sup>1. (1937)</sup> P. C. I. J. Series A/B., No. 71.

United States of America and Great Britain (representing Canada) affords an example. After the First World War several Boundary Commissions were constituted for settlement of boundary disputes. The disputes were settled after taking into consideration title and geographical features of the disputed territory.

The Radcliffe Award of 1947 determined the boundary dispute between India and Pakistan in relation to Assam and East Bengal and West Bengal and East Bengal. This Award was considered later on by a Boundary Disputes Tribunal known as the Bagge Commission 1949), which was constituted to solve the existing disputes arising out of the Radcliff Award of 1947.

Great difficulty is experienced in water boundaries, where the problem which baffles solution is the line in the river that should denote the boundary. In the case of a non-navigable river the boundary line usually runs down the middle of the river following all turnings of the border line of both banks of the river. Where the river is navigable, the boundary line generally runs through the Thalweg of the river, i. e., the middle of the deepest navigable channel. This general rule was accepted by the Treaties of Peace in 1919, except in treaty arrangements or immemorial possession.

Boundary lakes also demarcate land between two or more States by a boundary line running through the middle of the lakes.

The boundary line of the maritime belt is uncertain and it cannot run nearer than three miles from the shore.

Rivers.-Rivers are part of the territory of the riparian State. Where, therefore, a river lies wholly within the territory or boundaries of one State, it belongs exclusively to that State, e.g., the Thaines. Such rivers are termed national rivers. Public and private vessels of foreign States cannot navigate in national rivers without treaty rights or without acquiring prescriptive right by long and immemorial user. Those rivers which run through several States are not national rivers but are commonly called boundary or international rivers, and each State owns that part of the river which runs through its territory. In such rivers the riparian States can regulate navigation on such parts of the rivers as lie in their territory and can exclude vessels of non-riparian States. Then there are rivers which have been internationalized by treaties. The Treaty of Paris (1856) set up the International Danube Commission which regulated the navigation of the river Danube. The Paris Peace Conference of 1947 laid down that the Danube should be free and open to all States. On November 11, 1949 a Danube Commission of riparian States was set up at Galaty. The U.S.A. Great Britain and France joined the Commission in protest.

There are also boundary rivers. By the treaty between Great Britain and the United States of August 9, 1842,—known as the Ashburten Treaty—the Rainy River was made part of the boundary line between Canada and the United States. The middle of the channel or Thalweg of the river marked the line of separation between the two countries. In 1952 an agreement was demarcation of the disputed boundary between Murshidabad in West Bengal, and Rajshahi in East Bengal along a section of the river Ganges, the boundary line to be its midstream.

The reasons for fixing the boundary line on the Thalweg are based on equality and justice. It was observed by the Supreme Court of the United

States in New Jersey v. Delaware1: "If the dividing line were to be placed in the centre of the stream rather than in the centre of the channel, the whole track of navigation might be thrown within the territory of one State to the exclusion of the other."

Where the river breaks into a new course, the boundary line is still based on the *Thalweg* unless the river abandons its bed or dries up entirely so as to make it impossible for the ascertainment of the old *Thalweg*. In such a case the boundary is fixed midway between the banks.

Congress of Vienna, 1815.—Rules were adopted at this Congress, and it was provided that the navigation of international rivers is free up to their mouth for all nations and that each riparian power must carry out the works necessary for navigation in that part of the river flowing through its territory.

The Paris Congress, 1856.—It opened up the Danube to all nations, created permanent commission for executing repairs and effecting improvements in that river and declared that the rule adopted at the Vienna Congress relating to the free navigation of international rivers by the merchant vessels of all nations was part of the European public law.

League Covenant.—The Treaty of Versailles declared the Elbe, the Oder, the Niemen, and the Danube from Ulm, together with lateral canals and channels serving as an access to the sea to more than one State, to be international (Art. 331). The nationals, p operty and flags of all powers were to be treated on a footing of perfect equality on all these waterways.

Barcelona Conference, 1921.—The League of Nations tried to unity laws with regard to rivers at a Conference at Barcelona in 1921. The Conference adopted two important conventions: (a) a Convention and Statute on the freedom of transit, and (b) a Convention and Statute on the regime of navigable waterways of international concern. There could not, however be much headway due to the conflict of State jurisdiction and its subsequent non-ratification by States having important international waterways in their territory.

Geneva Conference of 1930.—The Geneva Conference attempted to unify the laws and regulations applicable to river navigation and trade and drafted conventions on the registration of inland navigation vessels and on the unification of rules concerning collisions in inland navigation.

# Principal Rivers

The Rhine.—Article 3 of the Treaty of Paris, 1814, laid down that the navigation on the Rhine, from the point at which it became navigable to the sea and reciprocally shall be free, so that it could not be prohibited to any one. The Congress of Vienna, 1815, provided the rules of freedom applicable to the Rhine. The Convention of Mannheim of October 17, 1868, instituted an International Commission to regulate the navigation of the Rhine. The Commission admitted vessels under a foreign flag provided they were certified as fit for river navigation and piloted by a person who was domiciled in one of the riparian States. Article 354 of the Treaty of Versailles provided for the continuance of the Mannheim Convention. In 1936 Germany denounced the provisions of the Treaty of Versailles regarding the international Commission of the Rhine and it was reopened to navigation after the Second World War.

The Po.—The Milan Convention of July 3, 1849, provided that the navigation of the Po shall be free. The Treaty of Zurich, 1859, confirmed this pro-

1. [1934] 291 U.S., 361.

vision. Although the Po is now included in Italian terrttory, the principle of the freedom of navigation still holds good.

The Danube.—Navigation of the lower Danube was reserved to Russia and Turkey in accordance with the Treaty of Bucharest, 1812. Subsequently Russia obtained the monopoly of its navigation by the Treaty of Adrianople of 1829. The Treaty of Paris of 1856 abolished this monopoly and declared that the navigation of the Danube could not be subjected to an impediment or charge not expressly provided for by the stipulations contained in the treaty.

There is the European Danube Commission established by the Treaty of 1816. It is an independent body whose actions cannot be questioned by any belligerent. It is entrusted with the superintendence and maintenance of the necessary works for navigation facilities.

The Berlin Treaty of 1878 considerably enlarged the powers of the Danube Commission. These powers were confirmed by the Peace Treaties following the First World War. The Twelve Powers principally interested in the Danube signed a convention in Paris on July 23, 1921, declaring that navigation on the Danube, together with its tributaries, lateral canals and waterways was unrestricted and open to all flags on a footing of complete equality over the whole navigable course of the river.

Navigation on the Danube is free and open for nationals, vessels of commerce and goods of all the States, on a footing of equality in regard to port and navigation charges and conditions for merchant shipping in accordance with the Treatics of Peace with Rumania, Bulgaria and Hungary, 1947.

A conference was held in July 1948 at Belgrade with a view to drafting a new convention on navigation on the Danube. The Conference drafted a convention which was accepted by a majority vote. The United States, Great Britain and France abstained from voting on the acceptance of the Soviet draft and declared their refusal to recognise the abrogation of 1921 Statute without the consent of all the signatories.

The Congo.—It is the largest river in Africa. The convention of 1884 recognized the sovereignty of Portugal over both its banks as she had first discovered the river in the 15th century. Subsequently at a conference convened at Berlin in 1884 navigation was declared free on the river and on all its branches and mouths for all merchantmen, with equal treatment for all nations. An International Commission on the lines of the Danube was entrusted with the duty of supervising the observance of the regulations for navigation, but the Commission could not be set up. The provisions contained in the Berlin Act, 1885, were reconsidered by the Convention of St. Germain, 1919, which declared that the signatory powers undertook to maintain a complete commercial equality within the area defined by Article 1 of the General Act of Berlin of February 26, 1885.

Canals.—Canals are artificially constructed and as such form part of the State within whose territory they lie. But sometimes they can also be neutralised or internationalized if maritime powers agree to refrain from naval hostilities within the said waterways. The Suez Canal, the Dardanelles, the Bosphorus, the Keil Canal and the Panama Canal are examples of internationalized lakes.

The Suez Canal.-It connects the Mediterranean to the Red Sea. It was owned by a French company, called the Campagnie Universellee du Canal

Maritime de Suez, the controlling interest whereof was held by the British Government. The charter of the canal was to expire on November 17, 1969, when it was to be the property of Egypt.

By the Convention of Constantinople of October 29, 1888, between Great Britain Austria-Hungary, France, Germany, Holland, Italy, Spain, Russia and Turkey, the Suez Canal was made open in time of peace as well as of war to merchantmen and men-of-war of all nations. No permanent fortifications are allowed in the canal.

The canal lies on Egyptian territory but was guarded by British garrisons.

On December 18, 1914, Great Britain declared a British protectorate over Egypt. In 1922 Great Britain while declaring the independence of Egypt reserved for future negotiations between themselves, amongst others, of the defence of the canal. In 1936 Italy occupied Abyssinia and sent out huge armies to its colonies surrounding the Nile Valley. In such circumstances, Egypt offered to co-operate with Great Britain, and on August 26, 1936, there was a treaty of alliance between Great Britain and Egypt whereby the Suez Canal was regarded to be an integral part of Egypt, but, since it was an essential means of communication between the different parts of the British Empire, Britain was allowed to station near the canal troops to ensure the defence of the canal until such time when the Egyptian army could defend it by itself. During the Second World War the clauses contained in the Anglo-Egyptian Treaty of Alliance of 1936, were faithfully applied by both Great Britain and Egypt. Discussions for the revision of the Treaty initiated after the war could not, however, bear fruit.

On November 16, 1950, King Farouk of Egypt demanded immediate cancellation of the Anglo-Egyptian treaty, immediate evacuation of British troops from Suez and unity of Egypt and the Sudan under the Egyptian Crown. The Foreign Secretary, Mr. Ernest Bevin, replied that Britain had no intention of leaving the Middle East defenceless and asserted that there was no provision for modification or revision of the treaty except by mutual assent. Britain also rejected Egypt's demand for the immediate evacuation of British troops from the Suez Canal.

The Egyptian Prime Minister Nahas Pasha placed before the Egyptian Parliament a decree which was approved on October 16, 1951, and which entailed an end to the privileges enjoyed by the British troops in the Suez Canal. The attitude adopted by Britain was that Egypt's unilateral abrogation of the Anglo-Egyptian Treaty had no legal force, that the position of British forces stationed in the Suez Canal zone remained unaltered and her troops would stay in Egypt until an agreement was reached replacing the 1936-Treaty.

Britain also offered a four-power proposal (Britain, U. S. A., France and Turkey) for Middle-East defence and invited Egypt to join it as an equal partner; but Egypt rejected the proposal as falling short of Egypt's national aspirations.

After long negotiations on the 27th of July, 1954, Britain and Egypt reached an agreement on evacuation of British troops from the Suez Canal zone. It provided for the evacuation of British troops from the canal zone within 20 months, reactivation of the base in the event of an attack on the Arab States or Turkey and the base to be maintained by a British civilian contracting firm. The duration of the new agreement was seven years. But British troops were to return to the base in the event of an armed attack by an outside power on Turkey or on any Arab State.

22

The agreement recognized that the Suez Maritime Canal, an integral part of Egypt, is a waterway of international importance and expressed the determination of both parties to uphold the 1888-Convention guaranteeing the freedom of navigation of the Canal.

In the later part of July 1956, the Egyptian President Col. Gamal Abdul Nasser announced nationalisation of the Suez Canal and froze the Suez Canal Company funds in Egypt. The United Kingdom and France took a serious view of the nationalisation and sent strong protests to Cairo. Egypt rejected the protest notes, with the result that a 24-nation conference was convened in London in August, 1956. Representatives of 22 nations responded to the invitation issued by Britain, France and the United States. At this Conference Mr. Dulles of the United States submitted a plan for a settlement of the Suez Canal dispute asserting that, as stated in the preamble of the Convention of 1888, there should be established a definite system destined to guarantee at all times, and for all the powers, the free use of the Suez Maritime Canal. It envisaged respect for the sovereignty of Egypt but provided the establishment of a Suez Canal Board to which Board Egypt was to grant all rights and facilities appropriate to its functioning. The Board was to make periodic reports to the United Nations.

President Nasser denounced the Dulles plan for international control of the Suez Canal as self-defeating and provocative to the people of Egypt.

The Suez dispute was referred to the Security Council by Britain and France on account of the situation caused by Egypt's nationalisation in July 1956 of the international Suez Canal Company.

On October 13, 1956, the Security Council adopted unanimously a part of the resolution voted on in two parts, which affirmed six principles forming a basis for future negotiations on the Suez Canal dispute urging that (i) there shall be free and open transit through the canal without discrimination; (ii) Egypt's sovereignty shall be respected; (iii) the operation of the canal shall be insulated from the politics of any country; (iv) the manner of fixing tolls and charges shall be decided by agreement between Egypt and the users; (v) a fair proportion of the dues shall be allotted to development; (vi) in case of disputes, unresolved affairs between the Suez Canal Company and the Egyptian Government shall be settled by arbitration with suitable terms of reference and suitable provisions for the payment of sums found to be due.

The second part of the Anglo-French resolution approving the 18-nation plan for international control of the Suez Canal was vetoed by Soviet Russia.

On October 29, 1956, Israeli forces attacked Egyptain positions in the Sucz Canal area. Two days later the United Kingdom and France followed suit. A resolution moved by the United States in the Security Council calling on all nations to refrain from the use of force or threat of force in Egypt was vetoed by Britain and France on October 31, 1956.

On November 7, 1956, an Asian-African resolution was passed by the United Nations General Assembly calling for the immediate withdrawal of British, French and Israeli troops from Egyptian territory. The Assembly also voted to set in operation a United Nations police in the Suez area.

As a result of these resolutions a cease-fire in the area of hostilities was brought about.

Egypt conditionally accepted the stationing of a United Nations force in Egypt after taking all necessary guarantees that her acceptance will not infringe Egypt's sovereignty.

On November 24, 1956, the General Assembly demanded the withdrawal of British, French and Israeli forces from Egypt forthwith and authorised the Secretary-General to go ahead with plans for clearing the canal under the world organization's auspices.

The Suez Canal was cleared for maximum draught shipping on the 8th April, 1957, and the British Government agreed under protest to pay the Suez canal dues direct to Egypt.

On the 25th April, 1957, the Government of Egypt undertook to respect the obligations contained in the Constantinople Convention of 1888 and the Charter of the United Nations, and further agreed to refer any complaint against the Canal Administration to an arbitration committee whose decision was to be binding on the parties. It subsequently registered a declaration with the United Nations regarding the use of the canal, and deposited with the U. N. its acceptance of compulsory jurisdiction of the International Court of Justice in legal disputes arising between the parties to the 1888-Constantinople Convention in respect of the interpretation or applicability of its provision.

The end of the Middle East war in 1967 found the Israeli troops occupying the eastern banks of the Suez canal, with the result that no traffic through the canal is possible so long as there is no peace settlement between the U. A. R. and Israel.

The Kiel Canal.—This canal connects the North Sea to the Baltic Sea. It runs wholly through German territory and before the First World War, although Germany kept it open to vessels of other nations, she had the power to close it at her pleasure. The canal was constructed in 1896 by the German Government for strategic purposes, and was entirely under its control up to the Peace Treaties which followed the First World War. Article 380 of the Treaty of Versailles (1919) provided that "the Kiel canal and her approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality." In 1923 the status of the Kiel canal came up for determination before the Permanent Court of International Justice in the S. S. Wimbledon case.! On the 21st March, 1921, the Wimbledon, a British vessel chartered by a French company, was refused access to the canal by the German authorities on the ground that the vessel was carrying military materials to Poland which was then at war with Russia. The Permanent Court of International Justice held that it was the duty of Germany to have permitted the passage of the Wimbledon through the Kiel canal within the meaning of Article 380 of the Treaty of Versailles. It followed from that article that the S. S. Wimbledon belonging to a nation at that moment at peace with Germany was entitled to free passage through the canal. She could not advance her neutrality orders against the obligations which she had accepted under that article. It was accordingly laid down that the Kiel canal was to be open to States at peace with Germany even if the former were engaged in war in which Germany

On November 14, 1936, Germany, however, denounced unilaterally the main provisions of the Treaty of Versailles relating to the Kiel canal. It was

<sup>1.</sup> Perman nt Court of International Justice (1923) Series A. No. 1.

followed on January 16, 1937, by a regulation of the German naval command which required the foreign naval craft to obtain permission before entering the canal.

The Panama Canal.—The international status of the Panama Canal is governed by the provisions of the Hay-Pauncefote Treaty between the United States and Britain (1901), which throws open the canal to vessels of commerce and men-of-war of all nations on equal terms.

The canal territory belongs to the Republic of Panama. In accordance with a treaty signed between the United States and the Republic of Panama in 1903 called Hay-Bunau-Varilla Treaty of 1903 the new Republic of Panama granted the U. S. in return for an initial cash payment of \$10,000,000 and a stipulated annuity, exclusive control of a canal zone in perpetuity, other sites necessary for defence and sanitary control of Panama City. The independence of the Republic of Panama has been guaranteed by the United States in lieu of the grant in perpetuity of land five miles on either side of the canal by the former to the latter with rights of construction. The Republic of Panama was allowed greater jurisdiction over the canal area by an amendment of the above treaty in 1936. The canal maintains its neutralized character subject to the rights of the United States mentioned above.

Position of the Canal in two World Wars.—On the outbreak of the First Great War of 1914, the United States permitted the free passage of merchant vessels but regulated the passage of belligerent warships and prizes. When the United States became a belligerent a proclamation was issued excluding all enemy vessels save with the consent of the canal authorities.

At the beginning of the Second World War the President of the United States issued a proclamation prescribing regulations concerning neutrality in the canal zone on the same lines as those adopted by the United States in the First Great War before it became a belligerent. On January 14, 1942, President Roosevelt issued a Proclamation declaring the Gulf of Panama maritime control area' for purposes of defence and the protection of the approaches to the Panama canal.

U. S. vetoes resolution on Panama Canal.—The matter with regard to the disappearance of American jurisdiction and giving up the concept of perpetuity engaged the attention of the Security Council at its special session in Panama (Latin America, in March 1973 when the U.S. ambassador declared that the United States was ready to work out a new canal treaty with Panama but any new pact must leave operation and defence of the waterway under its control for an additional specified period. While supporting Panama's just aspirations, the United States, on March 21, 1973, however, vetoed the resolution moved by Panama and seven other nations calling on Washington to accelerate its negotiations with Panama and seek a new treaty over the U. S.-controlled zone in a spirit of friendship. The U. S. ambassador observed that he had vetoed it mainly because the issue was now under negotiation between both sides and that it was not appropriate or helpful for the U. N. to get involved in a bilateral

The U. S. decision to veto the Security Council resolution on the Panama Canal was surprising. The eight-nation resolution was an innocuous resolution, and thirteen of the 15 Council members voted for the resolution. It may be recalled that in the early years of the century the United States had landed its troops in the proposed Canal STRAITS 173

Zone area, which was then a district of Columbia and negotiated a treaty giving itself exclusive rights over the canal territory. The area has provided a useful military base for the United States and has also enabled it to get millions of dollars every year by way of toll charges from ships passing through the canal. The United States cannot ignore the Panamanians' demand for independence in view of the larger issues of sovereignty, nationalism and colonialism.

The Corinth Canal.—The Corinth canal was opened on August 24, 1893. It connects the Peloponnesus with Central Greece. It lies wholly within Greek territory and is free to the merchant vessels of all nations. Greece has the power to regulate the use of the canal, provided the same is consistent with the principles of the freedom of navigation.

Straits .- All straits which are not more than six miles wide are territorial. Certain straits are subject to special local regulations, viz. the straits of the Dardanells and the Bosphorus and they may be considered in a little detail. They connect the Mediterranean with the Black Sea and belong to Turkey. They were under the absolute sovereignty of Turkey until 1841, then Turkish-controlled, but subject to neutralization rules, until 1914. After the Great War of 1914-18 they were occupied by the Allies. They were subsequently demilitarized, opened to navigation of all kinds and placed under an international commission. After the victory of Kemalist Turkey over the Greeks, the Straits Convention was signed at Lausanne in 1923 whereby the signatory powers declared the Dardanelles, the Bosphorus and the Sea of Marmora open to merchant vessels, warships and aircraft in times of peace and of war. The Convention substantially mitigated international control by partly restoring Turkish sovereignty over the straits, inasmuch as she was given preference and control. The Convention of Montreux of July 20, 1956, provided for remilitarisation and refortification of the straits by Turkey, abolition of former international guarantees, removal of the international commission; in short, full sovereignty of Turkey was revived subject to certain conditions.

At the Potsdam Conference in 1945, the United States, Great Britain and the U. S. S. R. agreed that Montreux Convention needed revision and that each of them should negotiate directly with the Turkish Government. The proposals for revision were the subject of an exchange of notes between Russia, Turkey, Great Britain and the United States in 1946. The matter could not proceed further in view of the conflicting views of the United States and U. S. S. R., the former suggesting that navigation in the straits should be regulated by an international authority, the U. N., while the latter claiming that Turkey and the U. S. S. R. should organise joint means of defence of the straits in collaboration with other Black Sea Powers, the straits must be kept open to merchant vessels of all nations in time of war and peace and that the straits must always be kept open to war vessels of Black Sea Powers.

It was observed by the International Court of Justice in the Corfu Channel Case! that it is generally recognised and is in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorisation of a coastal State, provided that the passage is innocent.

<sup>1.</sup> I C. J. Reports 1949, p. 4.

National and territorial waters.—Waters adjacent to the territory of a State may be either national or territorial. National or interior waters consist of internal gulfs and bays, straits, lakes, rivers and harbours, ports, etc. These waters are entirely national and, in the absence of any convention to the contrary, foreign States cannot ask for any right for the passage of their vessels or subjects. According to Colombos, "it is now generally admitted that the bed of the waters and the subsoil beneath both the territorial and interior waters belong, to an unlimited extent, to the State which is sovereign of the territory on the surface. It therefore possesses the right to carry out the exploitation of both the surface and its subsoil by tunnelling or mining for coal and other minerals. Similarly the rights of the State extend to the air space above its territorial and interior waters."

Territorial waters, on the other hand, lie within a "definite maritime zone or belt adjacent to a State's territory," where foreign powers may claim certain rights for their vessels and their subjects, the chief of which is the right of innocent passage.

Maritime Belt.—The maritime belt is that part of the sea which is under the sway of the littoral States. There is considerable unanimity of opinion that the open sea cannot be State property and only such part of the sea as makes the coast waters would belong to the border State or would be the State property of the littoral States. These waters are again not national but territorial, i. e., contained in a certain zone or belt where foreign States have a right of innocent passage for their merchantmen. They are also termed as territorial waters or the "marginal belt" over which the littoral State has complete territorial sovereignty.

The term "territorial waters" is used to indicate that part of the sea which extends from a line running parallel to the shore to a specified distance therefrom, commonly fixed by the majority of maritime States at three marine miles measured from low-water mark.

Extent of marginal waters.—With regard to the breadth of the maritime belt Bynkershoek's view that the sea should belong to the State it borders as far as a cannon shot will reach from the shore, was adopted by many writers in the early stages. At the end of the 18th century the range of artillery was about 3 miles, and this enabled Lord Stowell to observe in the Anna² that since the introduction of firearms the boundary of territorial limits "has usually been recognised to be about three miles from the shore." But according to this rule the limit could not be consistent as it would increase according to the increased range of modern artillery. Grotius introduced the principle of limiting the dominion to the distance to which protection could reach it from the shore. Vattel observed that in general the dominion of the State over the neighbouring sea extended as far as her safety rendered it necessary and her power was able to assert it.

Great Britain by enacting S. 7 of the Territorial Waters Jurisdiction Act (1878) also prescribed the width of the belt as one maritime league, i.e., 3 geographical miles from the low water-mark and extended the jurisdiction of English Courts over offences committed in the territorial waters. This Act was passed to counteract the effect of the judgment in the Franconia case (R. v. Keyn), which had held that in the absence of a legislation the British Criminal

3. (1876) L. R. 2 Exch. D. 63.

Colombos: The International Law of the Sea, 2nd Ed., p. 62.
 5 C. Rob. 375, 385.

Court had no jurisdiction over offences committed by a foreigner on a foreign vessel in its territorial waters, i. e., within 3 miles from the coast.

The Under-Secretary of State for Foreign Affairs summarised the position prevailing in England when he observed in 1930: "His Majesty's Government have always maintained that by International Law and practice the general limit of territorial jurisdiction is three miles, but from time to time claims to extend the three-mile limit have been advanced by different States. Such claims which amount to annexation of the high seas, could only be made effective by international requirement."

The Suez Canal Convention of 1888 also recognised the three-mile range.

Like Great Britain, the United States has consistently adopted the threemile limit. Germany also regards the three-mile limit of territorial waters as the only one recognised in International Law. Japan also recognises the traditional three-mile limit.

Although there is some disagreement about the extent of the belt it is recognized as a customary rule that the minimum breadth is three miles and the littoral State could dominate such width of coastal waters as lay within three miles from the shore. As said above, Great Britain and U. S. A. share the above view; Norway, Sweden and Denmark hold the 4-mile limit; Turkey and Uruguay five; France, Greece, Portugal, Spain and India agree to 6-mile; while the Soviet Union claims twelve miles, and Egypt, Italy, Spain, Turkey and Yugoslavia also adhere to that claim. Among Latin American countries, Chile, Costa Rica, Ecuador and Peru claim no less than 200 miles, while the Republic of Eire agrees to that limit of territorial sea which is defined in accordance with International Law.

At the International Conference of the Law of the Sea held in Geneva in March 1958, the consensus of opinion appeared to be to prescribe the breadth of territorial waters to six miles, but no definite decision could however be reached, and the matter was left to the General Assembly to convene a second sea conference if it should consider desirable. The Geneva Conference also considered coastal States' exclusive fishing rights up to 12 miles, but the matter remained indecisive.

Rights of States over their territorial waters.—The maritime belt is open to merchantmen of all nations for inoffensive navigation although the littoral State is competent to frame laws and regulations regarding maritime ceremonials to be observed by such foreign merchantmen. The right of such inoffensive navigation flows from freedom of the open seas. The littoral State cannot levy tolls or require the payment of any dues for such passage from foreign vessels, except in consideration of special services rendered to them.

Men-of-war, according to the sounder view, also enjoy the same right of innocent passage in time of peace. The Institute of International Law in its resolution of 1894 declared that all ships, without distinction, enjoy the right of innocent passage through territorial waters subject to the rights of belligerents to regulate this passage. Vessels of war and vessels assimilated to them

Pakistan announced on March 21, 1973, its decision to extend its exclusive fishery zone to 50 nautical miles from its coastline to protect the sources of shrimp and save the fishermen from total ruination.

were, however, excluded from that provision. The Institute at the Stockholm Conference of 1928 declared that the free passage of warships be subjected to special rules by the territorial State. The International Law Association adopted at its Vienna Conference in 1926 the rule that the ships of all countries, public as well as private, have the right to pass freely through territorial waters, but are subject to the regulations enacted by the State through whose territorial waters they pass, provided that such regulations do not infringe other provisions contained in the Convention.

The Hague Codification Conference of 1930, although being unable to agree on a treaty, was however successful in preparing a Draft on "The Lega" Status of the Territorial Sea" as embodied in the Final Act of the Conference It was laid down there that sovereignty over the belt of sea round a State's coasts was exercised subject to the conditions prescribed by the present Convention and the other rules of International Law. The coastal State might put no obstacles in the way of vessels navigating the territorial sea, provided that no act be done prejudicial to the security, the public policy or fiscal interests of the State. Coastal States could take all necessary steps to secure these rights, and by legislation, in conformity with international usage, a coastal State could provide for the safety of traffic, protection of channels and of buoys, protection against pollution of any kind, protection of the products of the territorial sea and of the rights of fishing and shooting and analogous rights belonging to the coastal State. No charge was to be levied on passing vessels by reason of their passage through the territorial sea, except for specific service rendered to the vessel.

In the Corfu Channel Case the right of innocent passage was explained as "implying an obligation on the territorial State not to permit its waters to be used in such a way as to cause damage to the interests of other States."

The littoral State has a right to reserve the fisheries and the coasting trade to its own subjects and also to exercise powers of police and control or Norway, Sweden and Italy), however, do not prohibit foreigners from fishery while a few others (Portugal and Greece) give liberty to all to fish but subject to reciprocity.

In short, as observed by Sir Robert Phillimore in R. v. Keyn this dominion over three-mile distance is of a limited character. It is limited to the purpose to a general sovereignty over all passing vessels.

Islands.—The islands are the natural appendages of the coast on which they border and from which indeed they are formed. Where the island is situate within three miles of the shore, the belt of waters round it constitutes territorial waters. Even where the island is separated by more than three miles but within a limit of six miles from the coast, there is usually an seas is, however, not the property of any State till it is effectively occupied and notified to other States.

Archipelagos.—They are a group of islands, and the Draft Convention of the Experts Committee submitted to the Hague Conference of 1930 recognised that they should be considered as a unit and the extent of territorial waters be measured from the centre of the archipelago.

Rocks and Banks.—The position of rocks and banks is the same as that of an island. Outside the three-mile limit of territorial waters, they do not form part of the territory of the State unless they are capable of being effectively occupied and utilised.

Cabotage.—With regard to cabotage or coastal trade the rule is that the littoral State, in the absence of special treaties to the contrary, has a right to reserve it exclusively for its own vessels. Cabotage originally signified trade between two ports along the same coast but now extends to trade between any two ports of the same country whether on the same coasts or different coasts of the same country.

The Doctrine of the Continental Shelf. - President Truman according to the first proclamation issued on the 28th September, 1945, enunciated this doctrine the substance of which was that "a coastal power is not surrounded, even at low water, by a precipice leading vertically to the bottom of the ocean, perhaps two miles below. As a rule the sea-bed shelves vary gently outwards and downwards for a considerable distance, a distance generally (but not invariably) exceeding the three-mile territorial limit. Again, not always but very often, where the sea reaches a depth of about a hundred fathoms or two hundred meters, the edge of this shelf is reached and there is a more or less abrupt plunge of the land-mass down to the ocean floor. The doctrine of the 'shelf' as proclaimed in the Truman Declaration of 1945, having concern for the urgency of conserving and prudently utilizing its natural resources, abrogated to the United States 'jurisdiction and control' over 'the natu al resources' of the sub-soil and sea-bed of the American continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States subject to its jurisdiction and control." The proclamation went on to declare that where the continental shelf extended to the shores of another State, the boundary was to be determined by the United States and the State concerned in accordance with equitable principles.

According to Cecil Hurst, in general the sea bed on the seaward side of low water mark shelves gradually—not suddenly or precipitously—but slowly—so that a considerable distance seawards will have to be traversed before one reaches very deep water. It is the subsoil below this shelving area which is described as the Continental Shelf.<sup>1</sup>

The second proclamation directed attention to the inadequacy of present arrangements for the conservation and protection of fishery resources, and proposed the establishment of conservation zones explicitly bounded, without impairing right to free navigation.

A month after Truman's proclamation, the President of Mexico asserted that the Mexican Government would, with a view to conserving the resources for the welfare of the nation, the continent and the world, claim the right of jurisdiction, protection and control over continental shelf contiguous to its recognized territory. The Continental Shelf was treated as part of Mexico's territory, including the waters covering this shelf to a depth of 200 meters at low tide.

On October, 11, 1946, the President of Argentine Republic issued a decree declaring the submarine shelf and its superincumbent waters subject to the sovereign power of the nation.

Sir Cecil Hurst: International Law, The Collected Papers, p. 154

Nicaragua, Chile, Peru and Costa Rica made similar declarations proclaiming national sovereignty over the submarine shelf.

On November 26, 1948, a British Order in Council proclaimed the boundaries of the Bahamas as including the area of the continental shelf which lay beneath the sea contiguous to the coasts of the colony. A similar Order was also issued in regard to the coasts of Jamaica, including its dependencies.

The British Persian Gulf Proclamation of Saudi Arabia in 1949 also contained a recital similar to that of the Truman proclamation that "it is just that the sea-bed and subsoil extending to a reasonable distance from the coast should appertain to and be controlled by the littoral state to which it is adjacent."

The International Law Commission has defined the 'Continental Shelf' as that part of the sea-bed contiguous to the coast, but outside the areas of marginal seas, where the depth of the superjacent waters admitted of the exploitation of natural resources of the sea-bed and subsoil. The Commission has provided that the coastal State might exercise control and jurisdiction for the purpose of exploiting the natural resources of the shelf; but the legal status of the superjacent waters and of the air space above might not be affected thereby. The establishment or maintenance of submarine cables is not to be prevented. The navigation or fisheries are not unjustifiably to be interfered with. Any necessary installations in the shelf are not to be given the status of islands, but safety zones of limited extent may be established around them. Due notice is to be given of such constructions and installations.

The observations of Colombos in this connection are pertinent and may be quoted in his own words: "While these claims, so far as they relate to the subsoil and the exploitation of mineral resources by drilling extended from the coast by under-water operation, may be regarded as being in accordance with the accepted principles of International Law, the claims to the sea-bed must give rise to serious doubts. In spite of the declaration that the character as high seas of the waters above the continental shelf remains unaffected, it is hard to see how erection upon the open sea of oil-drilling installations could fail in time appreciably to affect freed m of navigation. It may therefore be doubted whether the right to unilateral occupation of the led of the sea over extended areas can be regarded as established in International Law, in any case where such occupation entails the setting up upon the high seas of installations inconsistent with the common right of free navigation."2

The trend of thought in the present day world is to include the continental shelf within the territory of the State. The concept of a marine league for the purposes of determining territorial waters has no doubt undergone considerable change and the requirements of national defence have made the same as understood in the 18th century completely out of date. Svarlien, therefore, suggests the extension of the territorial waters to the edge of the continental shelf or to a depth of 100 fathoms, and in all cases to a minimum of 12 nautical miles.<sup>3</sup>

According to Professor Lauterpacht, the doctrine of continental shelf is a reasonable one, although, as observed by Lord Asquith, it has not yet the hard lineaments or the definitive-status of an established rule of International Law.

Higgins and Columbos: The International Law of the Sea, 2nd Ed., p. 58.
 Svarlien: Introduction to the Law of Nations, p. 162.

<sup>1.</sup> Extract from an award by the Right Hon. Lord Asquith of Bish opstone in an arbitration award between Petroleum Development (Trucial Cost) Limited and Ruler of Abu Dhabi.

Geneva Convention on the Contintena IShelf.—Since the Truman Proclamation, 1945, asserting control over the resources of the continental shelf of the United States, the subject of a nation's rights to the animal and mineral resources of the seabed continuous to its shores has received considerable attention. Other nations laid claims similar to those made by the United States. The Convention on the Continental Shelf adopted at the Geneva Conference on the Law of the Sea, 1958, marks the first worldwide agreement on the subject. Article 1 of the Convention defines the "continental shelf." It reads:

"For the purpose of these articles, the term 'continental shelf' is used as referring (a) to the scabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the scale l and subsoil of similar submarine areas adjacent to the coast of islands."

Article 2 of the Convention provides:

- "1. The Coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
- 2. The rights referred to in paragraph I of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.
- 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or netional, or on any express proclamation.
- 4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."

It will be noticed from the above that the grant of sovereignty relates only to the sealed and subsoil, not in the seas and airspace above. This is further confirmed by the provision contained in Article 3, which provides that the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

Article 4 of the Convention reads: "Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables or pipe lines on the continental shelf."

Article 5 of the Convention, besides other things, provides that the exploration of the continental shelf and the exploitation of its neutral resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication. Subject to certain restrictions the coastal State is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and devices and to take in those zones measures necessary for their protection.

Such installations and devices, though under the jurisdiction of the coastal State, do not possess the status of islands.

Article 6 of the Convention reads:

- 1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
- 2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of territorial sea of each State is measured.
- 3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land.

Finally, Article 7 provides that the provisions of these articles shall not prejudice the right of the coastal State to exploit the subsoil by means of turnelling irrespective of the depth of water above the subsoil.

In the North Sea Continental Shelf Cases, Federal Republic of Germany Denmark, Federal Republic of Germany Netherlands, the International Court of Justice held that the doctrine of the just and equitable share appeared to be wholly at variance with what the Court entertained no doubt was the most fundamental of all the rules of law relating to the continental shelf, enshrined in Art. 2 of the 1958 Geneva Convention, though quite independent of it, namely, that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land' territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the scabed and exploiting its natural resources. At no time was the notion of equidistance as an inherent necessity of continental shelf doctrine entertained. Quite a different outlook was indeed manifested from the start in current legal thinking. It was, and it really remained to the end, governed by two heliefs:-, namely, first, that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and secondly that it should be effected on equitable principles. It was in pursuance of the first of these beliefs that in the draft that emerged as Article 6 of the Geneva Convention (referred to above), the Commission gave priority to delimitation by agreement, and in pursuance of the second that it introduced the exception in fovour of "special circumstances". Yet the record shows that, even with these mitigations, doubts persisted, particularly as to whether the equidistance principle would in all cases prove equitable. The equidistance principle could not, however, be regarded as being a rule of law on any a priori basis of logical necessity deriving from the fundamental theory of the

continental shelf and its use is not obligatory for the delimitation of the areas concerned in the present proceedings.

The Court, by eleven votes to six, held that (1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prlongation of the land territory of the other; (2) if, in the application of the preceding sub-paragraph the delimitation leaves to the parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a regime of joint jurisdiction, user or exploitation for the zones of overlap or any part of them.

Lakes and Land-locked Seas.—Land-locked seas and lakes which fall entirely within the boundaries of one State are part of the territory of the State. Where, however, the shores of such lakes and land-locked seas belong to two or more countries, they will be called international lakes and land-locked seas, the sovereignty of each State bordering them being restricted to the zone of its territorial waters.

Black Sea being a land-locked sea was formerly a part of Turkish territory. Its approach was through Bosphorus and the Dardanelles which exclusively formed parts of the Turkish territory and were not open to the merchantmen of all nations. The Treaty of Paris of 1856 declared it open and free to the commercial navigation of all countries except as regards warships which only Russia and Turkey were allowed to keep there in limited number and of small tonnage. The neutralisation of Black Sea was abolished as a result of the Treaty of London, 1871. The Black Sea continues to be an open sea and its position is regulated by Montreux Convention of 1936.

Bays and Gulfs.—Gulfs are those bays which penetrate deep into the land. Bays and gulfs whose entrance from the sea is not more than six miles wide (twice the width of the marginal belt) are internal or territorial. is more than six miles across, three miles on either side belong to the territorial power and the mid-channel is part of the open sea, belonging to no State but common to all for use. This rule is, however, not rigid for there are historical bays which are treated as territorial water although they are There are others who regard a bay of even ten miles as territorial water, which view was adopted by the North Sea Convention of 1882 and found favour in the North Atlantic Coast Fisheries case, decided by the Permanent Court of Arbitration in 1910. Apart from this rule, territorial jurisdiction may be claimed irrespective of the width on the ground of imme orial user, or historical acquisition followed by the acquiescence of other states. Thus France claims the Bay of Cancale or Granville seventeen miles wide, Great Britain claims the Hudson Bay fifty miles wide, U. S. A. the Cape Code Bay thirty-two miles wide and Norway Vestifjord and Varanger-Fjord thirty two miles wide.

Ports.—It was declared by the Institute of International Law at Stockholm in 1928 that ports and roadsteads were under the sovereignty of the littoral State, but, as a general rule, access to them was open to foreign vessels.

The sovereignty of the littoral State over a port does not confer any unlimited power to prohibit its use to foreign nationals. As a rule ports and harbours are open to international traffic in time of peace, but military ports

may be closed to foreign warships or merchant vessels for justifiable reasons. The Geneva Convention of 1923 relating to the International Regime of Maritime Ports provided that the sea going vessels of the contracting parties shall enjoy, on a basis of reciprocity, equality of treatment in, and freedom of access to, the maritime ports of the contracting parties.

The Doctrine of Hot Pursuit.—"A vessel may be pursued upon the high seas and there seized when she, or a person on board her, commits a violation of the laws of a foreign State while within its territorial waters. This is known as the doctrine of "hot pursuit." This right enables the men-of-war of a littoral State to pursue immediately upon the high sea, seize and brin: back into a port for trial any foreign merchantman which has committed an offence within the territorial waters of that State. Article 11 of the unratified draft on the Legal Status of the Territortial Sea annexed to the Final Act of the Hague Conference for the Codification of International Law (1930) provides that "the pursuit of a foreign vessel for an infringement of the laws and regulations of a coastal State, began when the foreign vessel is within the inland waters or territorial sea of the State, may be continued outside the territorial sea so long as the pursuit has not been interrupted. The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State."

The right of hot pursuit was recognized by Story, J. in the Marianna Flora<sup>2</sup> although it was observed that "the party in such case seizes at his peril. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages."

The doctrine received recognition in the case of The North<sup>3</sup> where the Supreme Court of Canada held that 'by the law of nations when a vessel within foreign territory commits an infraction of its laws either for the projection of its fisheries or its revenue or coasts she may be immediately pursued into the open seas beyond the territorial limits and there taken."

The Institute of International Law accepted the doctrine of hot pursuit and provided that the capture should be notified without delay to the flag State.

In the case of I'm Alone<sup>4</sup> it was observed by the Commissioner that the United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But they opined that the admittedly international sinking of the suspected vessel was not justified by anything in the Convention. The Final Report of the Commissioners was to the effect that the sinking of the vessel could not be justified by any principle of International Law, and the doctrine of hot pursuit could not be applied to the case.

The Geneva Conference on the Law of the Sea, 1958.—Upon a resolution of the General Assembly of the United Nations passed on the 21st February, 1957, calling for a conference of its members to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embedy the results of its work in one or more international conventions or such other instruments as it may deem appropriate, the Geneva Conference on the Law

(1826) 11 Wheaton 1, 42.
 (1906) 37 Can. S. C. Rep. 385.

<sup>1.</sup> Higgins and Colombos: International Law of the Sea, 2nd Ed., p. 108.

<sup>4. (1933: 1935) 3</sup> Reports of Arbitral Awards, p. 1609.

of the Sea was convened from February 24 to April 27, 1958, with representatives of 86 countries. All members of the United Nations, with the exception of Ethiopia and the Sudan, attended. The representatives from the Federal Republic of Germany, the Holy See, the Republic of Korea, Manaco, San Marino, Switzerland and the Republic of Vietnam also attended.

The Conference was presided over by Prince Van Waithaya'son of Thailand. In addition to the General Committee, the Drafting Committee, and the Credentials Committee, five other committees of the Conference were established. The Conterence adjourned on the 27th April, 1958, after adopting and opening for signature four Conventions on (1) the territorial sea and the contiguous zone, (2) the high seas, (3) fishing and the conservation of the living resources of the high seas, and (4) the continental shelf. In addition it approved an Optional Protocol of signature concerning the Compulsory Settlement of Disputes and endorsed nine resolutions, two of which called for further consideration by the General Assembly.

Breadth of the territorial sea.—The Geneva Conf rence had the benefit of six sersions of prior work by the International Law Commission. The U. S. S. R. bloc claimed a twelve mile breadth of the territorial sea; Bulgaria, Communist China, Ecuador, Ethiopia, Guatemala, Indonesia, Iraq, Libya, Panama, Rumania, Saudi Arabia, the United Arab Republic and Venezuela also shared the same view; Ceylon, Golombia, India, Iran, Israel, Italy, Lebanon, Morocco, Spain, Thailand, Uruguay and Yugoslavia laid claim to a six-mile limit; and Austraia, Belgium, Brazil, Canada, China (Taiwan), Cuba, Denmark, France, Japan, Jordan, Liberia, Malaya, Netherlands, New Zealand, Pakistan, Poland, Tunisia, Union of South Africa, the United Kingdom and the United States claimed a three-mile limit. The variety of conflicting claims provided the occasion for considerable discussion in the Conference.

The Conference had before it a draft prepared by the International Law Commission in its final report to the following effect:

- 1. The Commission recognizes that international practice is not uniform as regards delimitation of the territorial sea.
- The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.
- 3. The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many states have fixed a breadth greater than three miles and, on the other hand, that many states do not recognize such a breadth when that of their own territorial sea is less.
- 4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference.

The position taken by the States at the Conference tended to be correlated to the importance of fish and fish products in their national economies and foreign trade. Iceland being heavily dependent on fish and having nearby fishing grounds used extensively by other states, claimed exclusive rights to exploit them by an extension of the territorial breadth of the sea or by creating a zone contiguous to the territorial sea in which these exclusive rights would apply. The United Kingdom being also dependent on fish for food but having no customary fishing grounds gave vehement opposition to recognition of any such exclusive rights unless a reservation was made as to their right to continue exploiting resources on which they had depended

in the past. The United States, Japan, Holland, Belgium, Greece, France, West Germany and other maritime nations concentrated their attention on the preservation of the traditional limit of the territorial sea at three miles, except as modified by historical limits to a reasonable extent. This view was actuated both by the well recognised practice in International Law as also by military and commercial interests.

Canada put up a resolution which called for a six-mile territorial sea and a fishing zone of twelve miles from the baseline. The United States offered a compromise proposal to the effect that the territorial sea should be extended to six miles, with the right of the coastal State to regulate fishing for another six miles subject to certain historical fishing rights, i. e., the rights of states that had fished for a period of five years prior to the opening of the Conference were to continue. India and Mexico suggested a territorial sea of three to twelve miles with the fishing zone extending twelve miles from the baseline regardless of the breadth of the territorial sea. The Soviet draft was similar except that it envisaged a territorial sea even broader if special conditions warranted. Sweden proposed a six-mile territorial sea, with no contiguous fishing zone.

In order to be approved by the Conference for incorporation into the Convention, a proposal had to get the two-thirds majority (52) of the Conference participants. None of the resolutions secured a two-thirds vote, the American proposal having received the largest number of votes, 45 to 33. The result was that a two-thirds majority could not be obtained in favour of the traditional three-mile limit which only exhibited a desire on the part of nations to extend this limit, "not that such an extension in International Law has been accomplished."

After the Conference Iceland unilaterally declared on the 30th June, 1958, that with effect from the 1st September next her fishing limits would be extended to twelve miles.

Straight Baselines.—As regards straight baselines, Article 4 of the Convention on the Territorial Sea adopted by the Conference laid down that in localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured. Baselines are not to be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above-sea level have been built on them.

Innocent Passage through International Straits.—Article 16 (4) of the Convention on the Territorial Sea adopted at the Conference reads:

"There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State."

This article was adopted in accordance with the decision of the International Court of Justice in the Corfu Channel case, which had declared that it was, in its opinion, generally recognised and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the

A. J. I. Law, Vol. 52, 1958, p. 616.
 (1949) I. C. J. Rep. 28

high seas without the previous authorization of a coastal State, provided that the passage was innocent.

The Contiguous zone.—Article 24 of the Convention adopted at the Conference reads in part:

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

- (a) prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
- (b) punish infringement of the above regulations committed within its territory or territorial sea.
- 2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

Fishing and Conservation of the Living Resources of the High Seas.—One of the most notable achievements of the Conference was the adoption of a comprehensive code regulating the conservation of the natural resources of the sea. Article I of the Convention recognises the general right of all states for their nationals to engage in fishing on the high seas, subject to any individual treaties. It, however, imposes on all states a positive duty to adopt, or to cooperate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

Conservation of the living resources of the high seas is defined in Article 2 as the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products.

Coastal states under the Convention occupy a special status as to the seas adjacent to them. They are entitled to participate in any system of research and regulation for conservation purposes, even though their nationals do not carry on fishing in the subject area. (Art. 6). States having a special interest in conservation of a particular area, although not actually engaged in fishing in that area, may ask the States which do fish there to adopt a programme, or take such States to arbitration. (Art. 8. An arbitration procedure by a special arbitral commission of five members is provided in Article 9 of the Convention.

Continental Shelf.—The provisions with regard to the Continental Shelf adopted at the Geneva Conference have been adverted to earlier.

Miscellaneous Provisions.—The conference, besides adopting four conventions each of which constitutes a general code of law, adopted, in addition, a series of resolutions on topics such as nuclear tests, pollution of the high seas by ridio-active materials, conservation conventions, coastal fisheries and historic waters. The Conference resolved that disputes between nations about the interpretation of Conventions should be referred to the International Court of Justice. It also adopted a resolution sponsored by Nepal on the humane killing of marine life with special reference to whales and seals. It further permitted amendments of the Draft Code of Sea Law by giving the right of innocent passage through territorial seas to all nations whether coastal or not.

Measures to Prevent Radioactive Pollution.—The second committee of the 86-state conference on the law of the sea, unanimously adopted on the

15th April, 1958, at Geneva a new article providing for measures to prevent pollution of the seas by radio-active materials and waste. Proposed jointly by Argentina, Ceylon, India and Mexico and incorporating suggestions by the United States, Britain and Czechoslovakia, the text of the Article reads:—

- 1. Every State shall take measures to prevent pollution of the seas from the dumping of radioactive waste, taking into account any standards and regulations which maybe formulated by the competent international organisations.
- All States shall co-operate with the competent international oaganisations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radioactive materials or other harmful agents.

The Conference on the Law of the Sea held in Geneva in 1958 was the first world-wide conference on the subject since 1930. The agreements reached there are of great value for the future, inasmuch as they impinge on the unlimited sovereignty of States as regards the law of the sea.

On the 13th December. 1969, the U. N. General Assembly unanimously adopted a resolution on the prevention of marine pollution and requested the Secretary-General, in co-operation with the specialized agencies and intergovernmental organizations concerned, to complement reports and studies under preparation, with special reference to the forthcoming United Nations Conference in 1972 on the Human Environment, by a review of harmful chemical substances, radio-active materials and other noxio s agents and waste which may dangerously affect man's health and his economic and cultural activities in the marine environment and coastal areas and seeking views of member. States on the desirability and feasibility of an international treaty or treaties on the subject.

Human Environment.—A United Nations Conference on the Human Environment was convened on 5-16 June, 1972, at Stockholm. This was the first international gathering to take a comprehensive look at man's surrounding. Almost all the nations of the world attended the Conference excluding the Soviet bloc countries. The U. S. delegate suggested a 27-nation commission of the Economic and Social Council to deal with the international environmental questions. Great Britain proposed a global convention against dumping of noxious wastes in oceans. Malaysia's delegate, however, voiced a note of caution towards the question of environment, saying that the rich nations would gain more than the poorer ones from environment control and therefore the financial responsibility must stay with the former. The Conference approved a recommendation for banning all nuclear tests. The recommendation was strongly opposed by China which has appeared on the nuclear arena only recently,

At the end, the Conference adopted a sweeping 25-point declaration of principles to guide governments in their handling of the world environmental crisis. Some of the more important points deal with the establishment of an international fund to assist poor countries in their national ecological programs, the resettling of the homeless all over the warld and the banning of nuclear weapon tests.

## Sovereignty Over the Air

Theories as to the Air Space.—It is universally agreed that the air space over the open sea and over unoccupied territory is absolutely free.

As regards air space over the occupied territory, both national and

territorial, there is a difference of view among jurists, and the different theories in this regard may be stated as below. The first theory advocates that the air space is entirely free and open to all. The second theory propounds, upon the analogy of the maritime belt, that the lower zone of territorial air space belongs to the subjacent State while the higher zone of air space is free. The third theory is that air space to an unlimited height lies within the domain of the subjacent State. The last theory is that air space is within the sovereignty of the subjacent state subject to a servitude of innocent passage for foreign civil aircraft, but not military aircraft.

Before the First World War it was generally agreed that air space over the territory of national and territorial waters of a State was within the exclusive sovereignty of the subjacent State without any servitude of innocent passage for foreign aircraft.

Paris Convention, 1919.—In 1919, a Conference of the principal States at Paris adopted an instrument known as the Convention for the Regulation of Aerial Navigation. This Convention applies at the time of peace only. The United States of America was not a party to this Convention. The main provisions of the Convention were: (1) The contracting States recognized that every State had complete and exclusive sovereignty in the air space above its territory and territorial waters, but each party undertoo; to accord in time of peace freedom of innocent passage to the private aircraft of other parties so long as they complied with the rules of the Convention. Each contracting State also reserved the right to prohibit all private flying over certain areas for military reasons or for public safety. (2) The aircraft must bear their nationality and registration marks and the name and residence of their owner when engaged in international navigation. (3) Every private aircraft engaged in international navigation must carry: (a) a certificate of registration, (b) a certificate of air worthiness from the State to which it belongs; (c) certificates of competency and licences in respect of each member of the operating crew; (d) a list of passengers; (e) bills of lading; (f) log books and (g) special licences for wireless equipment. Private aircrafts exercising their right of innocent passage across another State without landing must follow the route prescribed by the State flown over, and must land even against their will if ordered to do so. (4) The authorities of t c territorial State have the right to visit every foreign private aircraft and verify its documents, upon landing and upon departure. (5) Military aircraft may not fly over, or land in, the territory of another party without special authorization. (6) The Convention established an International Commission for Air Navigation as a permanent Commission under the direction of the League of Nations.

Havana Convention, 1928.—The Paris Convention of 1919 did not apply to certain American States, but in February 1928 a number of American States, including the United States, concluded a Convention, known as Havana Convention on Commercial Aviation on the lines of the Paris Convention.

Warsaw Convention, 1929.—The Warsaw Convention prescribing rules regarding international air transport was signed on October 12, 1929, with a view to bringing uniformity in the rules regulating the conditions of international carriage by air.

Five Freedoms of the Air or the Chicago Convention, 1944.—The International Civil Aviation Conference met at Chicago in 1944 to conclude world-wide arrangements for commercial air traffic rights as also technical and navigational matters. The Conference discussed a variety of subjects, and there was a proposal to obtain agreement of all the states to the concession of the "Five Freedoms of Air", namely, the rights of the airlines of each State—

- (a) to fly across foreign territory without landing;
- (b) to land for non-traffic purposes;
- (c) to disembark in a foreign country traffic originating in the State of origin of the aircraft;
- (d) to take on passengers, mail, and cargo destined for the territory of that State whose nationality the aircraft possesses; and
- (e) to carry traffic between two foreign countries.

The International Air Services Transit Agreement embodying the Five breedoms was signed by 19 States only, and a majority of the States represented at the Conference, including Great Britain, did not sign this agreement.

An International Air Services Transit Agreement, called "two freedoms agreement", was ultimately drawn up which embodied an agreement on the part of the States to grant to international air services the first two Freedoms, namely, the privilege to fly across foreign territory without landing and to land for non-traffic purposes in foreign territory. This agreement was signed in 1945 by 33 States and in 1951 was in force among fortyone States. Soviet Russia was, however, not a party to the agreement.

Article I of the Chicago Convention recognized complete and exclusive sovereignty of every State over the air space above its territory. The Convention, however, granted freedom to fly across the territory of the contracting States without landing and freedom to land in the territory of the contracting States for non-traffic purposes. The flight of Sydney Cotton over the territory of India to Hyderabad before the Police Action in September 1948, without the permission of the Indian Government, was severely commented upon by the Government of India on the ground that the passage was not innocent, inasmuch as he was engaged in transporting arms and ammunitions to Hyderabad. On the complaint of India the British Air Ministry suspended the flying licence of Sydney Cotton.

International Civil Aviation Organisation.—As a result of the agreement arrived at the Chicago Conference, an International Civil Aviation Organization has been established, replacing the 1919 International Commission for Air Navigation. The new Organization is one of the specialised agencies of the United Nations and decides, subject to appeal to the International Court of Justice, disputes between members relating to the application of the Convention.

The provisional International Civil Aviation Organization began functioning in August 1945 and was replaced by the permanent body on April 4, 1947. It has to study problems of international civil aviation and to establish international standards and regulations. Its principal achievement in the legal field was the I. C. A. O. Assembly's adoption in June 1948 of a Convention on the International recognition of rights in aircraft.

The I. C. A. O. was increasingly active in the legal field in 1969-70, due to the increasing occurrence of unlawful acts endangering the safety of civil aviation. A Convention for the Suppression of Unlawful Seizure of Aircraft was signed on December 16, 1970, at The Hague by a Diplomatic Conference on Air Law, convened under I. C. A. O. auspices. It provides for effective legal measure to deter acts of unlawful seizure of aircraft through the cooperation of nations throughout the world.

Wireless Communications.—The jurisdiction which a State is entitled to exercise over its superjacent air space enables that State to prevent injurious

transmissions by means of Herzian waves emanating from foreign sources. The International Wireless Telegraph Convention of Berlin, 1906, provided for an exchange of wireless telegrams between coastal stations and stations on shipboard. There were subsequently the London Radio-Telegraphic Convention, 1912, and the London Convention, 1914. In 1927 the Washington Conference concluded a new International Radio Telegraph Convention, Article 2 of which provided that "the contracting Governments undertake to apply the provisions of the present Convention in all radio-communication stations established or operated by the contracting Governments and open to the international service of public correspondence." The International Telecommunication Convention was concluded at Madrid on December 9, 1932, and provided elaborate rules to regulate wireless communication through air spaces of the contracting parties. The European Broadcasting Conventions of June 19, 1933, and September 15, 1948, introduced legal regulations in this domain whereby the parties have undertaken definite obligations with regard to the operation and installation of broadcasting stations.

Servitudes.—There now remains to discuss the question of State servitudes. Starke defines an international servitude as "an exceptional restriction imposed by treaty on the territorial sovereignty of a particular State whereby the territory of that State is put under conditions or restrictions serving the interests of another State, or non-State entity." "It is a right whereby the territory of one State is made liable to permanent use by another State for some specified purpose." Thus by agreement a State may be obliged to allow the passage of troops of a neighbouring State or may be prevented to fortify its frontiers in the interest of the neighbouring State.

Its Essentials.—The essentials of an international servitude, as pointed out by the United States counsel in the Vorth Atlantic Goast Fisheries arbitration are:

- (a) the real right must belong to a nation ;
- (b) it must be a permanent right;
- (c) it must be one which makes the territory of one State serve the uses and purposes of another State; and
- (d) it must be restrictive or permissive.

Positive and Negative Servitudes.—Servitude may either be positive (affirmative or active) or negative in character. The former means that a State has a right to perform certain acts on the territory of another State, viz., building and operating a railway in a certain territory, establishing a custom-house, having fishery rights in the territorial waters of another State, etc. The latter connotes that the State bound by the servitude must refrain from doing something on that territory or abstain from exercising its territorial rights in some ways. Thus it may permit a State to demand that a neighbouring State shall not fortify its frontiers or increase its naval or land armament beyond a certain limit.

Military and Economic Servitudes.—Oppenheim mentions two more kinds of servitudes, viz., military and economic. The former is a servitude

<sup>1. |</sup> G. Starke: An Introduction to International Law, 7th Ed. p. 239.

acquired for military purposes, such as the right to keep troops in foreign territory, or to send an armed force through foreign territory, or to demand that a town on foreign territory shall not be fortified, and the like. The latter is a servitude which is acquired for the purpose of commercial interests, traffic and intercourse in general, such as the right of fisheries in foreign territorial waters, to enjoy the advantages of a free zone for customs purpose or of free navigation on a river, to build a railway on or lay a telegraph cable through

Then, some authors regard internationalised rivers and canals as servitudes. This, however, does not bring out the 'dominant-servient' relations as envisaged is a servitude.

Validity of State Servitudes.—The State servitudes are rights in rem running with the object with which they are connected. They bind the res no matter the territory to which they apply may change hands. Thus the servitude that Huningen in Alsace should not be fortified in the interest of the Swiss Canton of Basic remained unextinguished although the Alsatian town of Huningen became German in 1871 and French in 1918.

Extinction of Servitudes. - Servitudes being rights in rem, pass on to the annexing State if the State bound by the servitude is annexed or merged by another State. These being territorial in nature are not extinguished as a result of succession of the State. Servitudes may, however, be extinguished by agreement between the States concerned or by express or tacit renunciation on the part of the State entitled to the benefit. These may also be extinguished by vital change of circumstances, i. e., rebus sic stantibus.

According to Dr. Reid: "Servitudes establish a permanent legal relationship of territory to territory, unaffected by change of sovereignty in either of them, and terminable only by mutual consent, by renunciation on the part of the dominant State, or by consolidation of the territories affected."1

Leading Cases and Principles concerning international servitudes.— In the North Atlantic Coast Fisheries case2 the United States alleged that the fishery rights granted to her by Great Britain in 1818 were a servitude. The Permanent Court of Arbitration did not agree with this contention on the ground that there was no evidence that the doctrine of international servitude was one with which either American or British statesmen were conversant in 1818 and that the doctrine was unsuited to the principle of sovereignty which prevailed in States under a system of constitutional government and to the present international relations of sovereign States. The Court held that the right of Great Britain to make regulations without the consent of the United States to take fish was inherent to the sovereignty of Great Britain, which was limited in that the regulations must be made bona fide and must not be in violation of the treaty of 1818.

In the S. S. Wimbledon case3 the contention that the right of passage through the Kiel Canal was a State servitude was negative I by the Permanent Court of International Justice. The Court observed that it was not called upon to take a definite attitude with regard to the question, which was of a very controversial nature, whether in the domain of International Law, there really existed servitudes analogous to the servitudes of private law. Judge Schucking, bowever, preferred to describe it as a servitude.

In the case concerning Right of access of Portugal to certain territories of India, the International Court of Justice held that Portugal had in 1954 a right of

1. H. D. Reid: International Servitudes in Law and Practice (1932), 25.

Permanent Court of Arbitration (1910), No. VII.

3. Permanent Court of International Justice (1923), Series A. No. 1.

passage over intervening Indian territory between coastal Daman and the enclaves and between the enclaves, in respect of private persons, civil officials and goods in general, to the extent necessary, for the exercise of its sovereignty over the enclaves and subject to the regulation and control of India. The Court further held that no right of passage in favour of Portugal involving a correlative obligation on India had been established in respect of armed forces, armed police, and arms and ammunition. In coming to these conclusions the Court did not resort to general international law on the subject but based its decision on the footing that existing practice in the instant situation was the appropriate guide. It no doubt, by implication, granted not free access but limited access, with discretion to the territorial State to regulate and authorise the exercise of rights-though here again, as observed by Judge Spender, "the right to accord or refuse permission is, in all the circumstances, interpreted not as one of absolute discretion but as a controllable discretion, one which must be used reasonably and not capriciously, one which must be exercised in good faith."

The Geneva Convention on the High Seas, 1958, acknowledged the right to free access to the sea on the part of landlocked States.

The Convention on Transit Trade of Landlocked States adopted in 1965 also ensured freedom of transit of goods between the territory of a landlocked State and the sea on routes mutually acceptable to the States concerned and subject to regulatory measures with a view to facilitating the traffic.

#### CHAPTER XV

# PASSAGE OF SHIPS THROUGH INTERNATIONAL\* WATERWAYS

The fortunes of international waterways are generally linked to those of the land mass through which they pass, with the result that international waterways in time of war offer a comparatively restricted passage than in time of peace.

Barcelona Conference.—The Barcelona Conference convened at the instance of the League of Nations in 1921 produced a Convention and Statute on the Regime of Navigable Waterways of International Concern whereby each of the contracting parties accorded free exercise of navigation to the vessels flying the flag of one of the other contracting States on those parts of navigable waterways. Each riparian State was bound to refrain from measures likely to reduce the facilities for navigation which might occur. Article 12 further provided that in the absence of special conventions making other arrangements, navigable waterways were to be administered by each of the riparian States under whose sovereignty or authority they might be situated. The Statute did not specifically attempt to regulate the rights and duties of belligerents and neutrals in time of war, but only laid down under Article 15 that it continued in force in time of war so far as such rights and duties permitted.

S. S. Wimbledon.—The matter received attention in the case of the S. S. Wimbledon where a British vessel, Wimbledon, chartered by a French company, was refused access to the Kiel canal by the German authorities. The German action was based on the fact that the vessel was carrying military materials to Poland which was then at war with Russia and that the passage of the vessel would have been contrary to the German neutrality regulations. The Permanent Court of International Justice observed that although the Kiel

<sup>1.</sup> Permanent Court of International Justice (1921), Series A. No. 1.

Canal, having been constructed by Germany in German territory, was, until 1919, an internal waterway of the State holding both banks, the Peace Treaty of Versailles relating to the Kiel Canal, did not assimilate it to other internal navigable waterways of the German Empire. Article 380 of the Treaty of Versailles laid down that the Kiel Canal should be maintained free and open to the vessels of commerce and war of all nations at peace with Germany, and it was impossible to allege that the terms of that article precluded, in the interests of the protection of Germany's neutrality, the transport of contraband of war. Accordingly the Court observed that the passage of neutral vessels carrying contraband of war was authorised by Art. 380, and could not be imputed to Germany as a failure to fulfil its duties as a neutral. It appeared clearly established that Germany not only did not, in consequence of her neutrality, incur the obligation to prohibit the passage of the Wimbledon through the Kiel Canal, but, on the contrary, was entitled to permit it. Moreover, under Art. 380 of the Treaty of Versailles, it was her definite duty to allow it.

Free passage of Waterways during War.—The Suez Maritime Canal, the Convention of Constantinople of 1888 provided, shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag. The extent of the power of Egypt for taking measures for its defence was not made clear by related provisions. The Hay-Pauncefote Treaty of 1901 regulating the status of the Panama canal laid down that the canal was to be free and open to the vessels of commerce and of war of all nations observing these rules, but the treaty made no mention of the measures which could be taken by the United States for the defence of the canal or in time of war.

It is clear from the above that the law relating to international waterways has to a large extent not concerned itself with the problem of assuring the free passage of such waterways during war, and for its answer the recent practice of States has to be looked into to discover the international custom as evidence of a general practice accepted as law.

The topic may be studied from two points of view, i. e., (i) when the littoral State is not at war, and (ii) when the littoral State is at war.

(i) When the littoral State is not at war.—The practice of States, which no doubt is not abundant, generally indicates that littoral or riparian States permit passage of ships, merchant vessels or warships, belligerent or neutral, save in exceptional cases where certain considerations of geography or politics may necessitate denying passage to certain categories of ships. The riparian States' primary concern is to prevent the commission of hostile acts within the waterway, and so long as that right of neutrality is not endangered, it matters little to them whether these are the warships or merchant ships that pass through the waterway.

Straits of Magellan.—In the first World War Chile declared the whole of the Straits of Magellan to be within its territorial waters but permitted the passage of warships. During the Second World War the Straits of Gibraltar were freely utilised for warships during the invasion of North Africa. Even earlier than the two world wars, warships were freely allowed to pass through the Danish Straits between the Baltic and the North Sea during the Crimean War, the Franco-Prussian War of 1870, the Russo-Turkish War and the Russo-Japanese War. As regards the Suez Canal the Convention of Constantinople of 1888 provided that the canal be kept open, in time of war as in time of peace, to every vessel of commerce or of war. The canal was freely used by the warships of nations at war in which Egypt and Great Britain were neutral. In the last two world wars, Egypt being itself a belligerent took measures of a

military nature that enemy ships did not pass through the canal. But no restrictions were placed either in the Italo-Abyssinian hostilities preceding the Second World War or the recent conflict in Korea as regards the passage of warships.

It was observed in the Corfu Channel case! that it is generally recognised and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a

coastal State to prohibit such passage through straits in time of peace

Nationalization of Suez Canal.—The controversy with regard to the passage of ships through the Suez Canal, arising during the period of active hostilities between Israel and Egypt, lent added importance to the problem of assuring the free navigation of international waterways. The Security Council was already on record since 1951 that under the 1888-Convention Israel was entitled to the use of the Canal like any other country. But Egypt's position had been that its war status in relation to Israel continued in spite of the Armistice of the 24th February, 1949, and that the 1888-Convention debarred war supplies to Israel through the Canal.

As a result of this conflict Israel, followed by Britain and France, invaded the Egyptian territory towards the end of October 1956 in flagrant violation of the U. N. Charter. A special United Nations General Assembly was convoked to stop the clear and naked aggression. It passed a resolution on the 2nd November, 1956, expressing its grave concern over the developments and called upon the parties to withdraw all forces behind the armistice lines, to desist from raids across the armistice lines into neighbouring territory and to observe scrupulously the provisions of the armistice agreement. This resolution was reaffirmed and reinforced by the resolutions of the 4th and 7th November, 1956, directing the cessation of hostilities and the withdrawal of the forces of Israel, the United Kingdom and France from the territory of Egypt. As a result of these resolutions a cease-fire in the area of hostilities was brought about. The matter engaged the attention of the Security Council, but it did not specifically adopt any resolution with regard to the right of passage of ships through the Suez Canal in time of Suffice it to say that the Suez Canal Convention holds the waterway open to every vessel of commerce or of war in time of war as in time of peace.

Aqaba Gulf and Tiran Territorial Waters.—The Gulf of Aqaba is the eastern flank of the Red Sea towards its northern extremity. The one towards west is the Gulf of Suez. The Gulf of Aqaba is over one hundred miles in length, and varies in width between three miles on the narrow bay at its northern end and seventeen miles at its widest point. Its mouth is approximately nine miles in width that lies from Sinai Peninsula headland to Arabian Peninsula headland. A valve-shaped island at the entrance, Tiran island further narrows the possibility of access to the Gulf. The four coastal States which enclose the Gulf are the United Arab Republic, Saudi Arabia, Jordan and Israel. The United Arab Republic (Egypt) is sovere ign of the western or Sinai Peninsula coast, and Saudi Arabia of the eas ern coast. Jordan and Israel, each possesses a small coastal strip at the very head of the Gulf. Egypt, Saudi Arabia and Jordan do not maintain diplomatic relations with Israel and have not yet recognised its existence since its birth in May, 1948.

1. I.C. J. Reports. 1949, pp. 4, 26.

25

Israel's establishment in May 1948 led to the breaking out of hostilities between Israel and several of the surrounding Arab States, including Egypt. Egyptian measures against Israeli shipping in the Gulf of Aqaba were undertaken in the summer of 1950 and were justified by the Egyptian Government on the ground of its sovereignty over navigation in her territorial waters. It maintained that the Palestine hostilities of 1948 constituted a state of war between Egypt and Israel, a condition which had not terminated by the signing of the Rhodes General Armistice Agreement of February 24, 1949. It argued that the agreement merely ended active hostilities and was not tantamount to a treaty of peace. As a consequence of this state the international law of war rather than the international law of peace was applicable to Israeli shipping in the Strait of Tiran and accordingly the passage of Israeli shipping into and through the Gulf of Aqaba could not be regarded as innocent.

It was further contended on the side of Egypt that the Tiran Strait fell in the same category as the Dardanelles which led to the Black Sea. Both the Gulf of Aqaba and the Black Sea border on more than one State. But there is one difference between the Gulf of Aqaba and the Black Sea. In the case of the Black Sea the States Lordering on it have been there from time immemorial but the State of Israel is a new comer in the Gulf of Aqaba and has not so far received recognition of the States which control the Gulf of Aqaba. The right of innocent passage throught the Dardanelles in time of peace was only introduced by a series of international treaties after years of war. The last of these treaties was the Montreux Convention of July 20, 1936, which, while accepting the principle of free navigation, gave Turkey the right to prohibit passage of ships of any States at war with her.

The Israeli Government, on the other hand, asserted that the Gulf of Aqaba and the Strait of Tiran should be free and open to all shipping including its own. It was argued that the Armistice Agreement was not a more suspension of hostilities; it was the renunciation of all hostile acts. It was further argued that Israel was in no state of war with Egypt and Egypt had not the least right to be at war with Israel.

On the complaint of Israel to the Security Council that the four armistice agreements with Egypt, Jordan, Syria and Lebanon had terminated the state of war between the Lelligerents, Egypt contended that the state of war continued despite the armistice agreements and that the blockade of the Sucz Canal and later of the Gulf of Aqaba was legal. On the 1st September, 1951, the Security Council passed a resolution calling upon Egypt to lift its blockade. This action of the Security Council was construed as indicating that a general armistice is a kind of de facto termination of war. Colonel Levic in an illuminating article observes: "It is considered more likely that the Security Council's action was based upon a desire to bring to an end a situation fraught with potential danger to peace than it was attempting to change a long established rule of International Law. By now it has surely become fairly obvious that the Israeli-Arab General Armistice Agreement did not create even a de facto termination of the war between those States."

Israeli forces launched an offensive on the 29th October, 1956, against Egyptian forces in the Sinai Peninsula, and it is only after the passage of two United Nations resolutions of February 2, 1957, calling on Israel to complete its withdrawal behind the armistice demarcation line without further delay and a plea from President Eisenhower for Israeli withdrawal that the Israel Government later announced on March 1, 1957, that it had decided on full and prompt withdrawal from the Gaza strip.

At the time of the withdrawal of Israel forces .from the Gaza strip and the Gulf of Aqaba area, the legal status of the Gulf of Aqaba figured prominently before the General Assembly of the United Nations in March, 1957. Among the assumptions on which the Israel plans for withdrawal were based was that the United Nations Emergency Force would move into the Tiran Straits area following the Israeli withdrawal, it being recognised that functions of U. N. E. F. in Tiran Straits area included prevention of belligerent acts. The Israeli Foreign Minister said that interference by armed force with ships of Israeli flag exercising free and innocent passage in the Gulf of Aqaba and Tiran Straits would be regarded by Israel as an attack entitling her to exercise her inherent right of self-defence under Article 51 of the U. N. Charter and to take all such measures as were necessary to ensure free and innocent passage of her ships in the Gulf and in the Straits. She based her arguments on two assumptions: (1) That Aqaba Gulf was international waters and no nation had the right to prevent free and innocent passage through it; and (2) That other maritime nations like the United States and France were prepared to subscribe to this theory.

The United States asserted to exercise the right of free and innocent passage and joined with others to secure general recognition of this right. France considered the Aqaba Gulf as international waters because of its width and because of the fact that its coasts belonged to four nations.

Saudi Arabia lodged its caveat on the 17th January, 1957, Ly asserting that the Gulf of Aqaba was not an international waterway but rather a closed Arab Gulf and that its waters constituted Arab territorial waters. It was also asserted that the Gulf was a natural passage for the caravans of Muslim pilgrims going to the Holy Places like Macca and Medina and that the Saudi Arabian Government would never allow the establishment of any right of Israel in the Gulf of Aqaba.

In the West Asian crisis of May-June 1967 the United Arab Republic again resorted to the blockade of the Gulf of Aqaba for Israeli ships. In the course of the war the Suez canal was closed to all shipping, thus causing great financial loss to U. A. R.

Effect of Armistice Agreements—Now with regard to the armistice agreement Sir Hersch Lauterpacht is of the view that armistices or truces, in the wider sense of the term, are all agreements between belligerent forces for a temporary cessation of hostilities. They are in no wise to be compared to peace because the condition of war remains between the belligerents themselves and between belligerents and neutrals on all points beyond the mere cessation of hostilities. This view is also shared by the American publicist Charles Chency Hyde who regards an armistice agreement to be a first step towards the conclusion of a treaty of peace, but not a substitute therefor. Professor Baxter is also of the view that the practices followed by States would seem to indicate that recognition of any right of passage through international waterways for enemy warships when the littoral State is a belligerent would be altogether unthinkable.

Now when an armistice agreement does not operate to terminate the legal state of war or to put an end to the rights of the belligerents to visit and search neutral vessels or to seize contraband and to enforce a blockade, there is force in the contention of Egypt that the blockade of the Suez Canal and later of the Gulf of Aqaba was legal.

Peace Time.—As regards the position of the Gulf in peace time we might first of all dispose of the claim of Saudi Arabia that it has the status

of a closed water area, an Arab mare clausum. Charles B. Selak, Jr. of the Columbia Bar pertinently repels this contention by observing that "no precision appears to have been given to Saudi Arabia's closed-sea claim, for no agreement appears to have been reached among the three Arab littoral States to provide either for joint control of the Gulf's waters or for an apportionment thereof."

When that stand of Saudi Arabia has been dismissed, the position in peace time appears to be in consonance with the following comments of George Grafton Wilson on Article 6 of the Harvard Draft Convention on Territorial Waters of 1929:

"Where the waters within the seaward limit are bordered by two or more States, it would seem that the bordering States should be permitted by international law to divide such waters between them as inland waters."

The Secretary-General of the United Nations, although of the view that the international significance of the Gulf of Aqaba must be considered to justify the right of innocent passage through the Straits of Tiran and the Gulf in accordance with recognized rules of international law, emphasized that a legal controversy existed as to the extent of the right of innocent passage through these waters. It is therefore desirable that, in the absence of an agreement by the coastal States on the establishment of a special regime for the Gulf of Aqaba, this controversy be decided by reference to the International Court of Justice, for in the absence of special arrangements through the United Nations Israel will not be able to enjoy the right of innocent passage through the Gulf.

Panama Canal.—In both the first world war and the second, warships of the belligerents were permitted to pass through the Panama Canal so long as the United States remained neutral. In November 1914 by a State Proclamation the provisions of the Hay-Pauncefote Treaty were given effect to by prescribing rules limiting the number of belligerent warships in the canal, laying down their order of departure and prohibiting the furnishing of supplies so that the vessel was kept free and open on terms of complete equality to vessels of commerce and of war. A similar proclamation was issued during the second world war.

The restrictions placed by neutral riparian States on the merchant vessels of belligerent powers navigating international waterways have been considerably less stringent than those imposed upon vessels of war and auxiliaries. This is so because the merchant vessels have lesser potentiality to engage in belligerent acts while in transit.

It is clear from a review of the above position that "warships have the right to pass through international waterways which have been dedicated to public use without compromising the neutrality of littoral State. The littoral State may, however, take necessary reasonable measures for the protection of the waterway and of its neutrality, including the protection of belligerent acts within the waterway itself. The practice of States, confirmed by international agreements and by judicial precedent, also establishes that ships of belligerent States or carrying contraband for their use may pass through international canals or straits in time of war, without prejudice, however, to the right of the neutral littoral State to impose reasonable regulations for its protection."

<sup>1.</sup> R. R. Baxter P-ssage of Ships through International Waterways in Time of War, The British Year Book of International Law, 1954. pp. 187, 201-202.

(ii) When the littoral or riparian State is at war. - The outbreak of a war to which the littoral or riparian State through whose territory an international waterway runs is a party, presents no easy solution for the passage of ships. Mines are usually laid by the belligerents for interdicting passage through natural straits, and it is for this reason that the passage of ships through international waterways assumes less importance. In the Corfu Channel Case the International Court of Justice observed that Albania, in whose territorial waters British warships had been damaged, would have been justified in issuing regulations in respect of the passage of warships through the Strait, but not in prohibiting such passage or in subjecting it to the requirement of special authorisation. The Court accordingly did not accept the Albanian contention that the Government of the United Kingdom had violated Albanian sovereignty by sending the warships through the Strait without having obtained the previous authorisation of the Albanian Govern-In view of the above observations the conclusion seems to be that a belligerent is under an obligation to provide passage though it may take reasonable measures for its security and control of the waterways and that only in extreme and urgent cases could it block passage of a strait.

The two world wars have clearly shown that although the canals and international straits may provide by the treaty obligations free and open passage to the vessels of all nations in time of war, it has proved impossible to give effect to these provisions when the State through whose territory such waterway passes is a party to the war. In the case of the Panama Canal, which is free and open to the vessels of all nations in time of war, according to the Hay-Pauncefore Treaty, the United States has expressly denied access to the Canal to the vessels of war, auxiliary vessels and private vessels of enemies. Baxter thus sums up his conclusions : "The provisions of the Treaty which might extend a right of free passage to enemy ships and which give the Canal a neutralized status must accordingly be considered, in legal as well as in practical effect, to have yielded to the realities of the strategic importance of inter-oceanic canals and of the manner in which modern wars are fought. It is not surprising, therefore, that in 1937 Germany, conscious of the importance of the Kiel Canal to its projected military adventures, closed that canal to the warships and naval craft of all foreign States, except when permission for passage had been obtained through diplomatic channels. One is forced to agree with Professor Siegfried that the Panama and Suez Canals in particular are no longer neutral, that they are defended by the interested States in their own interest, and that freedom of passage ceases to exist in time of war.2

Exercise of the right of visit and search .- As regards the Sucz Canal, Article 4 of the Convention of Constantinople of 1888 lays down that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal, its ports, and within a radius of three marine miles from such ports. circumvent the above provisions, both during the first and the second world wars, enemy vessels, which sought to make the Canal and its ports places of refuge, were escorted outside the Canal beyond the three-mile zone surrounding its ports and there they were seized by the British vessels as prize. objection being taken by the claimants that the action was inconsistent with Article IV of the Convention of 1888, the Privy Council held in the Rostock3

<sup>1.</sup> I. C. J. Reports, 1949, pp. 4, 26.
Baxter: Passage of Ships through International Waterways in Time of War, The British Year Book of International Law, 1954, pp. 187, 205.

<sup>3. (1916) 2</sup> A. C. 193, 195.

that it had no application to ships using the Canal not for passage but as a neutral port in which to seclude themtelves for an indefinite time, in order to defeat belligerents' right of capture.

The neutral State may no doubt impose reasonable restrictions for protecting neutral vessels, safeguarding its own security and neutrality, and facilitating the passage of ships. It must also not permit any hostile acts to be committed in the waterway and observe strict neutrality in all respects. The neutral character of the canals or other international waterways is, however, hardly respected by any belligerent, and vessels passing through them have been searched even in the canal in order to determine the character of the ships and their cargoes. The practice of States during the two world wars has clearly proved the futility of any rule recognising the right of passage through international waterways for enemy warships when the littoral State is a belligerent. The littoral States cannot deny themselves the opportunity of visiting, searching and seizing merchant ships passing through the waterways. The corresponding right of neutral warships and innocent merchant vessels to make use of the waterway must, under modern conditions, observes Baxter in his illuminating article already referred to, take second place to the legitimate need of the littoral State to defend itself and to derive strategic advantage from its control of the waterway. However, International Law must require that the authority of the littoral State be exercised reasonably and with due regard to the degree of seriousness of the danger anticipated.

### CHAPTER XVI

## MODES OF ACQUIRING AND LOSING STATE TERRITORY

The five common modes of acquiring territory are occupation, prescription, accretion, cession and conquest, which need consideration in some detail.

Occupation.—Oppenheim states that occupation is the act of appropriation by a State through which it intentionally acquires sovereignty over such territory, as is at the time not under the sovereignty of another State. It, therefore, relates to the establishment of sovereignty over a territory which had either been unoccupied or had recently been discovered. It is a means of acquiring territory not already in the dominion of any State. In other words, the territory must be res nullius for the purpose of occupation, which is not regarded as a State.

According to Vattel, "All men have an equal right to things which have not yet come into the possession of any one, and these things belong to the person who first takes pessession. When, therefore, a nation finds a country uninhabited and without an owner, it may lawfully take possession of it, and after it has given sufficient signs of its intention in this respect, it may not be deprived of it be another nation."

In order to constitute occupation there must be the intention or will of a State to take possession of unappropriated territory and settlement upon the land, i. e., establishment of some form of control over the occupied area. Oppenheim calls possession and administration as the two essential facts that constitute an effective occupation. By possession he means that the occupying State must take the territory under its sway (corpus) with the intention of acquiring sovereignty over it (animus. This is done by a settlement on the territory, accompanied by some formal act which announces both that the

territory has been taken possession of and that the possessor intends to keep it under his sovereignty. This is usually done either by a proclamation of formal appropriation or by the hoisting of a flag which is the emblem of sovereignty. By administration, Oppenheim means that the possessor must estal lish some kind of administration on the territory which shows that the territory is really governed by the new possessor.

The assertion of sovereignty must be displayed. It should be actual and not merely a nominal one or a paper claim. The claimant must act in a way which is legitimate of an international sovereign to act in order to exercise sovereignty. If the territory is uninhabited or sparsely inhabited, no officer need be appointed, and it will be enough if the claimant state could assume local administration when deemed necessary. The exercise or display of authority must also be continuous so that there be no exhibition of intention to abandon title.

Mere discovery of a land does not constitute acquisition through occupation. It gives an inchoate title, which is perfected by effective control and administration i. e., by means of settlement as an act of possession. If the inchoate title is not perfected into a real title of occuption within a reasonably sufficient time, the inchoate title withers away enabling any other State to acquire the territory by means of possession and administration. It was observed by Professor Huber, the arbitrator in the Island of Palmas Gase! that discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas.

In the Clipperton Island Arbitration Case of 1931 there was a dispute between France and Mexico regarding the sovereignty over Clippperton Island. There was a symbolic annexation of the island by a French naval officer under instructions from the French Government. This fact was notified to the Government of Hawaii and published in a journal in that island. Nothing was done by the French Government for the next 39 years in that connection. The two questions that fell for determination before the arbitrator were: (1 Was there any basis for the claim that Clipperton Island belonged to Mexico before the French proclaimed sovereignty? and (2) If no foundation in law and fact could be found to substantiate the Mexican claim, then had France proceeded to an effective occupation by satisfying all the conditions required by the law of nations? The first question was answered in the negative. On the second question, it was held that in order to establish the claim of sovereignty the occupation must be actual rather than nominal. The taking of possession consisted in the act, or series of acts, by which the occupying State reduced to its possession the territory in question and took steps to exercise exclusive authority there. On the basis of the French preclamation of sovereignty over Clipperton on November 17, 1858, the arbitrator held that Clipperton Island was legitimately acquired by France on November 17, 1858.

It was further observed in the above case that the fact that France had not exercised in a positive manner her authority on an uninhabited island did not entail the forfeiture of an acquisition which was already definitely perfected. There could be no abandonment of territory without the animus of abandoning the territory in question.

In the Eastern Greenland case2 the Permanent Court of International

<sup>&</sup>quot;A claim to sovereighty-based not upon some particular act or title such

American Journal of International Law, 1928, p. 367.
 P. C. I. J. (1933) Series AlB No. 53.

as a treaty of cession, but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention or will to act as sovereign, and some actual exercise or display of such authority."

It was observed in the above case that legislation was one of the most obvious forms of the exercise of sovereign power. Professor Alf Ross seems to be correct in saying that this is a fresh example of how the terminology of 'sovereignty' may obscure a clear understanding. To legislate for a certain territory is merely a vain pretention when there are no authorities to enforce the laws.

There is some doubt about the necessity of occupation being notified to other States. Holland and Pitt Cobbett deem it to be essential, while Oppenheim denies the existence of any binding rule of International Law which makes notification of occupation to other powers a necessary condition of its validity.

Legal Status of Germany.—The legal status of Germany subsequent to her defeat and unconditional surrender to Allied Powers remained in vacuum as the events subsequent to her surrender did not culminate in her de jwe subjugation by the victor nations. The allied army conquered the whole territory of Germany and the existing German Government was thrown overboard. At the end of the war there was a meeting of the Big Three at Potsdam in Berlin. The Conference was held from July 17 to August 2, 1945. It reached an agreement for the establishment of a Council of Foreign Ministers to do the necessary preparatory work for the peace settlements. The Council was to be composed of the Foreign Ministers of the United Kingdom, the Union of Soviet Socialist Republics, China, France and the United States. In accordance with the agreement on control machinery in Germany, supreme authority in Germany was to be exercised, on instructions from their respective Governments, by the commanders-in-chief of the armed forces of the United States of America, the United Kingdom, the Union of Soviet Socialist Republics, and the French Republic, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole, in their capacity as members of the Control Council. Writers like Jennings, Friedmann and Kelsen share the view that by means of this assumption of authority over Germany, the complete abolition of the former Nazi regime, and with the complete termination of hostilities, the international legal personality of Germany became totally extinct and ipso facts her territory was annexed by the Powers who had earlier conquered it. This however, does not seem to be the logical consequence, for the declaration expressly stated that the Allied Powers had no desire to annex Germany and thus to bring about her subjugation. On the contrary, it was stated that their aim was to prepare for the eventual reconstruction of German political life on a democratic basis and for eventual peaceful cooperation in international life by Germany. In the circumstances the control of Germany by the Allied Powers only suspended the sovereign status of Germany sine die, it having nowhere been stated in the Declaration that Germany was being annexed by the Allied Powers. As Starke observes, Allied control system was expressly of a provisional character, not involving annexation, was predominantly military in form, and based on the continuance of the German State as such and on the continuance of a technical state of war. It may even be held that the venture is unique and unparalleled in the history of belligerent occupation so far, but that disclaimer of the intention of annexation as expressed through the Declaration certainly disdains the conjecture that the Allied Powers subjugated de jure Germany by assuming

<sup>1.</sup> Alf Ross: International Law, p. 146.

sovereign authority over it. This usurpation of German sovereignty manifests all the attributes of subjugation, but since there was no express declaration of annexation, the utmost we can say is that this act tantamounted to an act intermediate between belligerent occupation and subjugation. This view was supported by the declaration of the British Foreign Office in 1946 in connection with the case of R. v. Bottrill, Ex Parte Kuechenmester (1946, I All E.R. 635) that Germany continued to exist as a State and that the war with her had not come to a close. The four victorious powers divided Germany into zones of occupation and their commanders-in-chief were given control and administration of the respective zones and a Control Council comprising the four commanders-in-chief was constituted to deal with matters concerning Germany as a whole.

Following a Soviet walkout the Allied Control Commission in Berlin ceased to function in March 1948 and the western powers proceeded to establish an integrated West German State. Thus the Federal Republic of Germany was formally proclaimed on the 23rd May, 1949, with Bonn as the capital of the West German State.

In the Eastern Zone the Communist-led German People's Council proclaimed itself on the 7th October, 1949, the People's Assembly of the German Democratic Republic and urged the restoration of German unity with full German sovereignty and withdrawal of occupation troops.

It is, therefore, clear that the Allied Occupation of Germany never amounted to her legal subjugation at any stage. It was a new experiment in which the traits of both belligerent occupation as also of subjugation were equally prominent. It was possibly more than belligerent occupation but at the same time short of total subjugation as the Allies never officially annexed Germany at any stage of their occupation. The experiment was an unprecedented one in the annals of war history. Germany's legal personality was only suspended for the time being but it was never legally extinguished. The acts of the Allied Powers since her surrender might be interpreted to be a de facto subjugation, but, since there was no official declaration of annexation, it could not be termed a de jure subjugation.

The Basic Treaty between the Federal Republic of Germany and the German Democratic Republic, initialled in Bonn in November 1972, specifically provides that the rights and responsibilities of the Four Powers and the corresponding related quadripartite agreements, decisions and practices remain unaffected by it. This means that the occupying powers still retain their rights and responsibilities technically for the whole of Germany.

Legal Status of Formosa (Taiwan).—Formosa and the Pescadores, which were formerly Chinese territories, were ceded to Japan by the Treaty of Shimonoseki of the 18th April, 1895. At the Cairo Conference President Roosevelt of the United States, Prime Minister Churchill of the United Kingdom and President Chiang Kai-shek of China declared on the 1st December, 1943, that all the territories Japan had stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. At the Berlin (Potsdam Conference, the President of the United States, the President of the National Government of the Republic of China and the Prime Minister of Great Britain reasserted on the 26th July, 1945, that the terms of the Cairo Declaration shall be carried out and this was one of the conditions for peace with Japan. On the 2nd September, 1945, Japan signed the instrument proclaiming the unconditional surrender to the Allied Powers and accepted the provisions set forth in the declaration issued

by the heads of the Governments of the United States, China and Great Britain on the 26th July, 1945, at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics. Chiang Kai-shek took over the administration of the island in October 1945. In the San Francisco peace treaty of the 8th September, 1951, Japan made a renunciation of all right, title and claim to Korea, Formosa, and the Pescadores.

On the above facts the legal status of Formosa (Taiwan), which is a question of some importance, has to be settled.

At the time of the Cairo and Potsdam Declarations the only party claiming Formosa was the National Government of the Republic of China. The dispute assumed importance only when the Chinese Nationalist Government moved to Taipei<sup>1</sup> in December 1949, and the Peking regime could not incorporate Formosa in the mainland ruled by them.

The Cairo Declaration of 1943 no doubt contained merely a statement of common purpose. It was, however, confirmed in the Potsdam Declaration of July 1945, and ultimately formed one of the conditions of peace with Japan. The British view that the Cairo Declaration being merely a statement of common purpose could not be binding on the parties, does not, therefore, appear to be tenable.

It has then been contended that the assumption of an interim administrative control in Formosa, at the direction of the Supreme Commander, Allied Powers, did not constitute retrocession of the island to China or the transfer of sovereignty from Japan to China. Sir Anthony Eden, the British Foreign Secretary, observed in February 1955, that this was not a cession nor did it in itself involve any change of sovereignty. Further, under the peace treaty of April 1952 Japan formally renounced all right, title and claim to Formosa and the Pescadores; but again this did not operate as a transfer to Chinese sovereignty, whether to the People's Repullic of China or to the Chinese Nationalist authorities. Formosa and the Pescadores are, therefore, in the view of the British Government, territory the de jure sovereignty over which is uncertain or undetermined.

International Law recognises occupation, prescription, accretion, cession and conquest as five common modes of acquiring territory. At the time of the declaration of war by China on Japan on the 8th December, 1941, China formally abrogated the Treaty of Shimonoseki—the treaty which had ceded to Japan the territory of Formosa. The abrogation of the treaty was a unilateral act and international practice does not warrant it. As regards the question of conquest or annexation on which Peking bases its claim, the position is that Japan surrendered to the Allied Powers and not to China alone, and as such one power cannot claim to have conquered the Island of Formosa so as to bring about retrocession of Formosa to China.

The Nationalist China pleaded that when Japan surrendered, the Government of the Republic of China repossessed Taiwan and Penghu, thereby completing the process of restoring these areas to China.

The Treaty of Peace Letween the Republic of China and Japan, signed on the 28th April, 1952, specifically stated that all treaties, conventions and agreements concluded before the 9th December, 1941, between China and Japan became null and void as a consequence of the war. The necessary consequence following from this clause of the treaty is that the unilateral abrogation of the treaty of Shimonoseki by China in 1941 received Japan's concurrence, and as such the initial act of China is validated by subsequent

1. Capital of Taiwan.

declaration made by the two parties in the Treaty of Peace of the 28th April, 1952.

It is true that Japan surrendered not solely to China but to the Allied Powers as a whole, but at the same time the Treaty of eace between the Republic of China and Japan signed in 1952 specifically declared null and void the Treaty of Shimonoseki of 1895 which had ceded Formosa to Japan. Further, the doctrine of Postliminium provides that if a State under temporary subjugation of another State is able to regain its liberty before the conquest has been completed, either during the course of war or at its termination, the legal state of things existing before the subjugation or hostile occupation is re-established. This doctrine may not be applicable to the full extent inasmuch as the subjugation of Formosa by Japan as a result of the Treaty of Shimonoseki of 1895 could not be said to be temporary or incomplete. But at the same time it nowhere asserts that the subsequent conquest or annexation should principally be obtained by the efforts and sacrifices of the power regaining the lost State.

Formosa is a part of Nationalist China at least de facto. Marshal Chiang Kai-shek has been exercising sovereignty over it, and-even if the status of Formosa may not be treated to have been changed from the date when China abrogated the Treaty of Shimonoseki, it certainly assumed a legal shape when Formosa began to be administered by the Chinese Nationalists to whom it was entrusted in 1945 as a military occupation and which position was legalised as a result of the Treaty of Peace between the Republic of China and Japan signed on the 28th April, 1952.

Dr. Schwarzenberger, an eminent authority on International Law, has taken the view that the co-signatories of the San Francisco Treaty, other than Japan, are all by law exercising a sort of condominium over Formosa and the Pescadores, with Chiang Kai-shek acting de facto as their agent, Marshal Chiang thus exercising only a delegated authority in Formosa. These States are free agents to decide collectively on the future of Formosa and Pescadores outside the United Nations, or with the consent of the latter, to transfer their condominium to the United Nations. This view is in consonance with the British view. The United States of America, on the other hand, was initially more inclined to recognise the sovereign rights of the de facto occupant, viz., the Government of Chiang Kai-shek over Formosa. This difference between the British and American views emanated because the former recognised the People's Republic of China, while the latter had recognised the Nationalist Government of China which exercised administrative control over the island.

If the renunciation clauses embodied in the peace treaty be deemed to operate as a cession of Formosa to the Allied signatories jointly, the difficulty with regard to the Kurile islands and South Sakhalin, which are in the same juridical category as Formosa, remains unresolved. They should also be subjected to Allied condominium. But in reality they are subject to the sovereignty of U. S. S. R. who occupied them belligerently in 1945. The renunciation of South Sakhalin was in form a cancellation of the relevant provision of the Treaty of Portsmouth, 1905, so that it may be considered that South Sakhalin reverted automatically to Russia.

Article 103 of the United Nations Charter envisages that in the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. It is asserted that the obligations undertaken by Great Britain and the United States in

the Cairo Declaration of 1943 shall be superseded by the latest obligations undertaken in the Charter of the United Nations.

The question, however, is whether the sovereignty of the Chinese Nationalists over Formosa is still in suspense, uncertain or undetermined so as to invoke the provisions of the United Nations Charter. The position does not appear to be in any way uncertain. Formosa was retroceded to China after the war. The Treaty of Peace between the Republic of China and Japan, signed on the 28th April, 1952, only confirmed the position, and the de facto sovereignty over Taiwan ripened into de jure sovereignty of the Nationalist Government of China. As has been stated earlier, the unilateral repudiation of the Treaty of Shimonoseki of the 18th April, 1895, by China when she declared war on Japan on the 8th December, 1941, received approbation from Japan when under the peace treaty she renounced all right, title and claim to Formosa. Actual possession and control of the island by the Chiang Kaishek regime for such a length of time only strengthens the case of the Nationalist China.

The idea of condominium over Formosa is an imaginary one. The Powers concerned did not exercise that condominium in fact; at the best they acquiesced in the exercise of sovereignty over the island by the Nationalist Government of China. Professor Quincy Wright also shares the view that the beneficiary of the renunciation in the San Francisco Treaty not having specifically been mentioned, the claims of the de facto occupant, the Government of Chiang Kai-shek were acquiesced in. The island was never placed under a condominium. It was neither placed under trusteeship. It was liberated and made part of China.

The legal position of Formosa assumed greater importance only after the establishment of the People's Republic of China. But this incident cannot upset an already established fact. If there is a dispute, the dispute is an internal affair, i.e., between the People's Republic of China and the Nationalist. Government of China. It is the result of the civil war between Chinese Communists and the Chinese Nationalists. And both the People's Republic of China and Taiwan adhere to the view of one China between Peking and Taipeh; but the quarrel is about who represents China. The People's Republic of China, however, does not intend to use force to unite but may create conditions whereby the Taipeh rulers voluntarily agree to negotiate the future of their island with their counterparts in Peking.

Man's Conquest of Moon and Mars.—According to Oppenheim occupation is the act of appropriation by a State through which it intentionally acquires sovereignty over such territory, as is at the time not under the sovereignty of another State. It, therefore, relates to the establishment of sovereignty over a territory which had either been unoccupied or had recently been discovered. It is a means of acquiring territory not already in the dominion of any State. In order to constitute occupation there must be the intention or will of a State to take possession of unappropriated territory and settlement upon the land, i.e., establishment of some form of control over the occupied area. Oppenheim calls possession and administration as the two essential facts that constitute an effective occupation. By possession he means that the occupying State must take the territory under its sway (corpus) with the intention of acquiring sovereignty over it (animus). This is done by a settlement on the territory, accompanied by some formal act which announces both that the territory has been taken possession of and that the possessor intends

to keep it under his sovereignty. By administration, Oppenheim means that the possessor must establish some kind of administration on the territory which shows that the territory is really governed by the new possessor.

Viewed from the above requirements there cannot be any territorial c aim on the moon arising from the landing of cosmic rocket on the moon's surface. Even the planting of flags on the moon or any other heavenly body is not enough to claim sovereignty over it. The assertion of sovereignty must be displayed. It should be actual and not merely a nominal one or a paper claim. The claimant must act in a way which is legitimate of an international sovereign to act in order to exercise sovereignty. Nothing is to happen by man's conquest of moon and mars. Mere discovery of a land or conquest of moon does not constitute acquisition through occupation. It gives an inchoate title which is incapable of perfection by effective control and administration, i. e., by means of settlement as an act of possession. Since the inchoate title cannot be perfected into a real title of occupation within a reasonably sufficien time, the inchoate title will wither away, and no problem of International law is to arise in the foreseeable future.

The treaty barring military activities in outer space and prohibiting States from placing weapons of mass destruction in orbit around the earth and installing such weapons on the moon and other celestial bodies came into force on October 10, 1967. It specifically provides that the moon and other celestial bodies must be used exclusively for peaceful purposes.

The United Nations Political and Security Committee is at present engaged in the preparation of a draft treaty on the moon and is considering the question whether the natural resources of the moon should be declared as part of the common heritage of mankind so that it may not be monopolised by any power now having the technical capability.

2. Prescription.—Prescription in International Law is the acquisition of territory by an adverse holding continued for a certain length of time. According to Grotius immemorial prescription for the Law of Nations has the advantage of extinguishing controversies concerning kingdoms and the boundaries of kingdoms by lapse of time which otherwise would have tended to disturb the minds of many and perpetuated wars, being repugnant to the common sense of mankind.

International Law does not fix any certain period of time so as to constitute a title by prescription. But it is necessary that the possession must be peaceful, without protests and continuous for a long period. There is, however, a considerable difference of opinion as to the length of the period which should elapse to constitute prescription. Grotius maintained that "a possession beyond memory, not interrupted, nor disturbed by appealing to an arbitrator, absolutely transfers dominion." On the other hand, recognised adverse possession as giving title if the owner had neglected his right or been silent about it during a considerable number of years. Vattel still conscious of the difficulty of this question asserted that prescription could be complete if neighbouring nations would come to an agreement on the subject by means of treaties. Oppenheim, however, tries to solve the difficulty of the period of time when he defines prescription "as the acquisition of sovereignty ever a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order."1

<sup>1.</sup> Oppenheim . International Law, Vol 1, 8th Ed., p. 576.

Though there is general recognition of the fact that there is no general rule as to the length of possession, a reference may be made to the Treaty of Washington (1871), which laid down a period of fifty years' adverse possession to constitute title by prescription, and to a treaty between Great Britain and Venezuela (1897) where also an adverse holding for fifty years was regarded as sufficient to constitute a title by prescription. [British Guiana Arbitration (1899)].

Prescription as a ground of title was recognized in Direct U. S. Cable Co. Ltd. v. The Anglo-American Telegraph Co. Ltd.1 It was observed that the British Government had for a long period exercised dominion over the Conception Bay and that their claim had been acquiesced in by other nations, so as to show that the Bay had for a long time been occupied exclusively by Great

In the case between Austria and Hungary on the Meerauge question (1902) the arbitrators explained immemorial possession as one which had lasted for such a long time that it was impossible to furnish the proof of a different situation and which no person could remember having heard or spoken of. Besides, such possession should be uninterrupted and uncontested. It went without saying that such possession should also have lasted upto the moment when the dispute and the conclusion of a compromis took place.

According to Hall,2 "title by prescription arises out of the long continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right, or has been unable to do so."

Vattel also recognised prescription founded on length of time as a valid and incontestable title. Phillimore also shares the same view when he observes that there is a lapse of time after which one State is entitled to exclude every other from property of which it is in actual possession.

Schwarzenberger3 sums up the rules developed by the Permanent Court of Arbitration and the Permanent Court of International Justice in the following four propositions:

Firstly, the State claiming title on the ground of prescription must display actual power in the contested region.

Secondly, the display must be reasonably continuous.

Thirdly, the display of sovereignty must be peaceful, at least in relation to other States.

Fourthly, though, short of treaty obligations to the contrary, no obligation of formal notification to third States exists, the display of State sovereignty must be public.

If these conditions are fulfilled, prescription is a title which is as good as any of the other modes of acquiring territory, and equally valid erga omnes.

(3) Accretion.—It is a mode of acquiring title by the action of rivers which increases land through new formations or addition of new territory to the existing territory of a State. The action of water adds new land to existing territory already under the sovereignty of a State. This mode presupposes the existence of territory with an actual sovereignty capable of extending to a spot falling within its sphere of activity.

New formations through accretion may be artificial, i.e., the outcome of human work by means of embankment, dykes and break-waters or natural, i.e.,

(1877) 2 App. Cas. 394.
 Hall: A Treatise on Int

Hall: A Treatise on International Law (1924), p. 143.

3. International Law, Vol. I, pp. 127-128.

CESSION 207

produced by operation of nature as by the drying up of a river or the recession of the sea.

Accretion also takes place by alluvion, which means an accession of land washed upon on the river bank or on the seashore by the waters. Accretion may also take the form of a delta, which is a triangular island built up at the mouth of a river by the deposit of silt. It may also take the form of an island built up in the bed of a river. The addition in each case becomes the property of the owner of the mainland.

The case of the Anna1 is important in this connection. The Spanish vessel the Anna had been captured by a British privateer near the mouth of the Mississippi within three miles of the mud islands belonging to the U.S.A. The United States contended that the capture was invalid, as it had been made within her territorial waters. Lord Stowell accepted the American contention and observed: "If they (islands) do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn this would be in the side of America! It is physically possible at least that they might be so occupied by European nations...... The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to shew, that these islands are not to be considered as part of the territory of America. Whether they are carth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil." Finally Lord Stowell concluded that the islands, formed by alluvial action, were the natural appendages of the coast on which they bordered and from which indeed they were formed.

Quired. It is the transfer of title to a territory by one State to another Ly means of a bilateral transaction. The transfer of territory implies the transfer of sovereignty over a definite area of territory. The term 'cession is wide enough to include a voluntary cession, by the general consent of the inhabitants of the territory. It is not necessary that the cession must be by the ruling power.

Cession takes place by means of a treaty embodying the conditions under which the transfer takes place. Such treaty may be voluntary, i. e., the result of peaceable negotiations (sale, gift or exchange) or may be made under compulsion, i. e., the outcome of war and is provided in the peace treaty or under threat of violent consequences in case of non-compliance. The cession may be made with or without compensation. The cession of Venice by Austria to France during war with Prussia and Italy in 1866 as a gift and its subsequent cession by France to Italy afford examples of voluntary cession. As an example of voluntary cession by the general consent of the inhabitants of the country may be given the instance of Dadra and Nagar Haveli which originally were Portuguese possessions but subsequently became independent by the action of the people of the territory and came to be known as Free Dadra and Nagar Haveli. The people of Free Dadra and Nagar Haveli subsequently voluntarily joined the Indian Union and their territory was made the Union territory of Dadra and Nagar Haveli under Part II of Schedule I of the Constitution of India.

Pondicherry, Karaikal, Mahe and Yanam in South India and Chander-

 <sup>(1805) 5</sup> C. Rob. 373, 385.

Edgar Sammut v. Strikland, A. I. R. 1939 P. C. 39, 43

magore in West Bengal are examples of territories which were acquired by cession by agreement between India and France.

An example of compulsory cession is furnished by the snatching away of Alsace-Lorraine by Germany from France in 1871. Sale of territory is also common, e. g., sale of Alaskan territory by Russia to America in 1867 or sale of the Danish West Indies by Denmark to the United States in 1916.

"The treaty of cession", observes Oppenheim, "Just be followed by actual tradition of the territory to the new owner-State, unless such territory is already occupied by the new owner, as in the case where the cession is the outcome of war and the ceded territory has been during such war in the military occupation of the State to which it is now ceded. But the validity of the cession does not depend upon tradition, the cession being completed by ratification of the treaty of cession, and thus enabling the new owner to cede the acquired territory to a third State at once without taking actual possession of it. But of course the new owner-State cannot exercise its territorial supremacy thereon until it has taken physical possession of the ceded territory."1

Occupation of territory in time of peace, with the concurrence of the sovereign, will constitute a presumptive evidence that it is the result of cession by treaty : "Bolletta, Trumpey."

In Edgar Sammut v. Strickland3 which was a case from Malta, their Lordships of the Privy Council observed as follows:

"The contention of the respondent on this part of the case is founded on the proposition that the prerogative of the Crown to legislate by Orders-in-Council and Letters Patent for the Government of a possession (using the word in the widest sense, is restricted to cases where the possession was acquired either by conquest or by cession, but the word 'cession' is employed by the respondent in this connection in a limited sense so as to exclude a voluntary cession by the general consent of the people. This involves the division of ceded territories into two classes, those acquired by an act of cession from some sovereign power and those ceded by the general consent or desire of the inhabitants. Their Lordships must observe that there seems to be no authority in any case or recognised textbook on constitutional law for this dis.inction. The leading writers have always divided the possessions of the Crown outside the United Kingdom into those acquired by conquest, by cession and by settlement."

The cession of a territory becomes effective only on actual transfer of so rereignty and not merely on an agreement to transfer.4

Under the Constitution of the United States, a distinction has been made by the Supreme Court of America between a territory being incorporated in the Union or becoming a part of the United States and such territory merely belonging to the United States. Thus the island of Porto Rico became, by a treaty of cession, territory appurtenant to the United States but not part of the United States.6 An alien people may not be incorporated in the United States by mere cession of territory without the express or implied approval of the Congress.

1. Op penheim: International Law, 8th El., Vol. I, p. 550.

 (1800) E.lw 171; 2 B I. L. C. 425.
 A. I. R. 1939 P. C. 59, 43.
 N. Masthan Sahib v. The Chief Commissioner, Condicherry, A. I. R. 1963 S. C. 531, at 538 & 539).

 Balzac v. Porto Rico (1922) 66 Law Ed. 627.
 Downe, v. Bidwell. (1991) 182 U.S. 244 Downe v. Bidwell, (1901) 182 U.S. 244

7. (1901, 182 U.S. 244, 287.

Plebiscite.—Peace treaties in case of cession are often followed by a plebiscite of the inhabitants. The Peace Treaties after the First World War adopted the method of plebiscite in certain cases. President Wilson approving of the idea of a plebiscite in connection with a number of territorial problems following the First World War observed before the United States Senate: "And there is a deeper thing involved than even equality of right among organized nations. No peace can last, or ought to last which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty as if they were property." The Constitution of France (1946) also envisages plebiscite in case of addition of any territory. A cession may be made dependent on the fulfilment of a suspensive condition, i. e., plebiscite confirming the cession. But, as Oppenheim observes, it is doubtful whether the Law of Nations will ever make it a condition of every cession that it must be ratified by a plebiscite.

International Legal Aspects of Kashmir Problem.—Jammu and Kashmir, the northernmost State of India, borders on the U. S. S. R., Sinkiang and Tibet in the north and north-east and Pakistan on the west and south-west. With the passing of the Independence Act, 1947, by the British Parliament transferring power to Indian hands, the ruler of Kashmir was at liberty to choose the future constitutional status of the State.

The strong economic pressure resorted to by Pakistan in the beginning later assumed the form of a full-scale blockade against Kashmir. In September 1947, there was concentration of tribesmen at the North-West Frontier Province, who, along with Western Punjab Muslims, trekked into the villages on the border of Kashmir and committed loot, arson and murder. The raiders were highly organised and soon they occupied a large portion of Kashmir territory in the Poonch area and threatened the occupation of Srinagar, the summer capital of Kashmir Government, as a first step to overrunning the whole State.

The Maharaja of Kashmir appealed to the Government of India for military aid. India had no jurisdiction to intervene in the internal affairs of the Kashmir State without its accession to India. To overcome this difficulty, on the 26th October, 1947, the Maharaja offered to accede the State of Kashmir to India and sent the instrument of accession for acceptance by the Government of India. The Indian Independence Act, 1947, did not prioride for the consultation of the wishes of the people of the princely states in order to determine the question of accession to either dominion, and as such India was free to accept the offer of the Maharaja of Kashmir acceding the State to India as final. On the 27th October, 1947, India accepted the accession of Kashmir by which Kashmir became an integral part of India. But for political rather than constitutional reasons, India volunteered that the accession should be subject to a plebiscite of the people to be held after the restoration of normal conditions in the State. The Indian Prime Minister observed that India could not finalise anything in a moment of crisis and without the fullest opportunity being given to the people of Kashmir to express their wish. It is, however, to be noted that the above declaration by the Prime Minsiter of India was made after the acceptance of the accession, and the accession was not made subject to that condition.

On the 30th December, 1947, the Government of India, under Article 35 of the United Nations Charter, referred the dispute to the Security

Congressional Record, Vol. 54, p. 1742 (January 22, 1917)

Council and asked the Security Council to call upon the Government of Pakistan to stop giving such assistance by preventing their personnel, both military and civil, from participating in or assisting the invasion of the Jammu and Kashmir State and deny to the invaders access to and use of its territory for operations against Kashmir. Pakistan refuted the allegations made by India and made countercharges.

In April 1948, the Security Council appointed a Commission for the restoration of peace and order by the withdrawal of tribesmen and Pakistan nationals that had entered the State for fighting. The Commission held numerous consultations with the two Governments and adopted a resolution on August 13, 1948, consisting of cease-fire and truce agreement. cease-fire order was accepted by both the Governments and it became effective from the midnight of January 1, 1949. As a result of the cease-fire order in Kashmir, the Commission proceeded further and passed another resolution on January 5, 1949, signifying the acceptance by the Governments of India and Pakistan of the various principles as being supplementary to the Commission's resolution of the 13th August, 1948. It provided for the determination of the question of accession of the State of Jammu and Kashmir to India or Pakistan to be decided through the democratic method of a free and impartial plebiscite. In accordance with the resolution of January 5, 1949, Admiral Chester Nimitz of the U.S. Navy was chosen by the Secretary-General of the United Nations as Plebiscite Administrator, with the approval of India, Pakistan and Kashmir. Differences, however, arose subsequently inasmuch as Pakistan claimed the so-called Azad Kashmir forces to be a part of the Pakistan Army and refused to liquidate those forces as well as her nationals fighting in any guise in Kashinir until the question of the reduction of India's force was discussed with the United Nations Commission. This stand was clearly in violation of the resolution of August 15, 1948, which had been accepted both by Pakistan and India.

On the 30th April, 1951, the Security Council appointed Dr. Frank Graham, President of the University of North Carolina, as U. N. representative in Kashmir, with instructions to make best endeavours to obtain the agreement of India and Pakistan to a plan for the demilitarisation of the State of Jammu and Kashmir according to the principles contained in the two U. N. C. I. P. resolutions. Dr. Graham submitted three reports to the Security Council and considerably narrowed the problem down to what appeared to be the prerequisite for an agreement on a plan of demilitarisation, namely agreement on the number and character of forces to remain on each side of the cease-fire line at the end of demilitarisation.

Dr. Graham in his report presented to the Security Council on October 10, 1952, reported his failure to bring about agreement between India and Pakistan on the method of demilitarising Kashmir before holding a plebiscite to decide whether Kashmir should accede to India or Pakistan.

In February 1954 the Kashmir Constituent Assembly finally decided to heccede to the Indian Union.

On February 21, 1957, the Security Council requested its President, the representative of Sweden, to examine with the Governments of India and Pakistan any proposals which, in his opinion, were likely to contribute towards the settlement of the dispute.

In his report Mr. Gunnar Jarring of Sweden, who was the President of

the Security Council for the month of February 1957, observed that in dealing with the problem, he could not fail to take note of the concern expressed in connection with the changing political, economic and strategic factors surrounding the whole of the Kashmir question, together with the changing pattern of power relations in West and South Asia. He further expressed that the Council would, furthermore, be aware of the fact that the implementation of international agreements of an ad hoc character, which had not been achieved fairly speedily, might become progressively more difficult because the situation with which they were to cope had tended to change.

Mr. Jarring in his report laid emphasis, in essence, on the fact that a plebiscite now would raise new difficulties and that there was substance in India's contention that the context of Kashmir question had been changed by Pakistan's adherence to military pacts and the opposition of the Kashmir people to the idea of a plebiscite on account of the rapid progress already

made in Kashmir.

On the 2nd December, 1957, the Security Council adopted a resolution by which it requested the U.N. representative for India and Pakistan to make recommendations to the parties for further appropriate action with a view to making progress toward the implementation of the resolutions of the U.N. Commission for India and Pakistan of August 13, 1948, and January 5, 1949, and toward a peaceful settlement.

Dr. Frank Graham, who visited the sub-continent in February 1958 with a view to securing peaceful ways of settling Kashmir question and implementation of the earlier resolutions of the Security Council, viz., of August 13, 1948, and January 5, 1949, could not however, succeed in his mission.

State of Jammu and Kashmir part of India.—It is said that after August 15, 1947, the State of Jammu and Kashmir became an independent State and its negotiations about the accession of the State to India assumed the character of an international treaty between two sovereign States. Even assuming that position to be correct, the principles of International Law governing treaties will apply to the Instrument of Accession. International Law is explicit that the contracting parties cannot revoke the treaty obligation unilaterally unless it becomes obsolete owing to force majeure and impossibility of performance or due to vital change of the circumstances.

It might be recalled that on the eve of the transfer of power to India and Pakistan, Lord Mountbatten made the Indian States practically independent, remarking: "My scheme leaves you with all the practical independence that you can possibly use and makes you free of those subjects which you cannot possibly manage on your own." All States had acceded excepting three, viz., Junagadh, Hyderabad and Kashmir, which did not accede either to Pakistan or India on account of the encouragement received from the above statement of Lord Mountbatten. The first controversy between India and Pakistan raged round the declaration of the Nawab of Junagadh to accede to Pakistan and the acceptance of such an accession by the latter. The Pakistan Government then did not emphasize geographical compulsions and a free plebiscite—arguments which are now being pressed into service by Pakistan in the case of Kashmir. As a matter of fact on the 7th of October an official announcement asserted that Junagadh and other States had acceded to Pakistan voluntarily and Irecly and that the Pakistan Government would not recognise anybody's right to interfere with the free exercise of

their choice. It will thus appear that in the case of Junagadh Pakistan completely ignored the principles of geographical contiguity and plebiscite, and considered the will of the ruler enough justification for agreeing to accession, as in their opinion the ruler of a State had an absolute right to accede to either of the dominions.

The Instrument of Accession by which the State of Jammu and Kashmir acceded to the Indian Union in respect of the three subjects was voluntary, although made at a critical time when the freedom of the State was imperilled. But that condition will not invalidate, or detract from the legality of, a perfectly lawful and valid act. The Union Government did not take any advantage of the distress of the State of Jammu and Kashmir. The State had entered into a standstill agreement with the State of Pakistan, and India had no jurisdiction to intervene in the internal affairs of Kashmir State unless the latter acceded to the former. There was no coercion of any kind on the State of Kashmir on the part of India. On the other hand, the Indian Prime Minister went a step further by volunteering that India accepted the accession of Kashmir subject to a plebiscite of the people after the restoration of normal conditions in the State. In these circumstances, the accession of the State was complete in law and in fact on the date when the Instrument of Accession was executed. In the words of Johnson: "The legality of the accession is beyond doubt. On this particular issue Jinnah has been hoist with his own petard, as it was he who chose over Junagadh to take his stand on the overriding validity of the ruler's personal decision."

This accession was further strengthened when the State of Jammu and Kashmir sent its representatives to the Constituent Assembly of India and accepted the Constitution of India. As observed by the Prime Minister of India, the first thing to remember in this connection was that Pakistan is the aggressor in Kashmir; she committed aggression and still continued aggression in a part of Kashmir territory. As regards plebiscite, the first major resolution of the U. N. Commission on Kashmir said that Pakistan armies must withdraw from the territory of Jammu and Kashmir. That was not done. Pakistan failed in carrying out that international obligation, and every other obligation followed from that.

5. Conquest and subjugation.—Conquest is the acquisition of the territory of an enemy through military force in time of war. Oppenheim says that mere conquest does not constitute title unless the conqueror, after having firmly established his conquest, annexes the territory. Such enemy State then ceases to exist and the war is brought to an end. And to such ending of war he terms subjugation. Thus according to him subjugation and not conquest is a mode of acquiring territory. Conquered enemy territory, therefore, remains under the sovereignty of the enemy—although actually in possession of the conqueror—till through annexation it comes under the sovereignty of the conqueror. Annexation thus turns the conquest into subjugation: It is thus incorporation of territory without the consent of the legitimate owner. The annexation of Korea by Japan in 1910 or of Abyssinia by Italy in 1936 furnishes examples of this form of acquisition of territory.

It will thus appear that the legal title by conquest arises when the territory is completely occupied and controlled by the military conqueror and the conquering State annexes by his declaration the conquered territory, or when the conquered territory is effectively reduced to possession and annexed by the conquering State.

Johnson: Mission with Mountbatten, p. 225.

According to Lord Wright, "a territory changed in national character and acquired that of the conqueror if there were effective subjugation and firm possession with the intention of keeping the conquests, even though, in the event, the dominion of the conqueror was temporary and even though there was not either formal annexation or cession."

The Permanent Court of International Justice noticed the effect of conquest in the Eastern Greenland case<sup>1</sup> when it observed: "Conquest only operates as a cause of loss of sovereignty when there is war between two States and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious State."

Title by Conquest under the Charter.—Prior to the establishment of the League of Nations or the United Nations and the General Treaty for the Renunciation of War, the right to make war was inherent in a State and title by conquest was perfectly legal. The position has since then changed. Article 2 of the Charter places an obligation upon all members to rafrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. The title to conquest, therefore, is illegal when the conquering State is bound by the Charter of the United Nations or the General Treaty for the Renunciation of War. It is legal only when resort to war in a particular case is lawful.

Liberation of Goa.—As an example of acquisition by conquest may be cited the acquisition of Goa, Daman and Diu, which have now been formed into a Union territory of India under Part II of Schedule I.

Goa, Daman and Diu, the Portuguese-held territories in India with a population of a little more than 6 lacs of people and having an area of 1538 sq. miles, had been under Portuguese rule for about four and a half centuries till their redemption in the middle of December 1961. Portugal was the first of three great European powers to capture a part of the Indian territory to carve out a tiny Indian empire and the last to leave the Indian shores. The English rulers came in 1601 and left in August 1947; the French whose arrival in India synchronised with the coming of Englishmen left the last of their enclaves in 1955: and with the fleeing away of the Portuguese the last vestige of colonialism in India disappeared.

It is an established principle of International Law that when a territory which had been occupied and a population which had been controlled by an enemy comes again into the power of its own state or when a state under subjugation throws off its yoke or is freed from foreign domination, the occupying country loses its control and the legal status of things existing prior to the hostile occuption is reestablished. The Portuguese territories in India having been conquered back by the parent State, India, her title is now complete by annexation. The right of conquest to these territories and subjugation was approved by the Permanent Court of International Justice in the Eastern Greenland case.

India's action in annexing Goa was not an action against a foreign state for territorial aggrandisement, prohibited by the Charter of the United Nations. She had not invaded Portugal, as neither the land nor the building of Goa was Portuguese by any stretch of imagination. India's action was to liberate its own territory. Goa, Daman and Diu being colonial territories had no raison d'etre for a single day after the Indian Union took its place in the

I. (1933) A/B 53.

international community of States as a sovereign and free State. Portugal's sovereignty on the territory of India was itself based on conquest and unabashed exhibition of force, employed against Indians who wanted to be

hospitable to the emissaries who had initially come to India as traders.

The provisions of the Charter loudly proclaim it to be the duty of all those members of the United Nations who are governing non-self-governing territories to develop self-government in those territories. The United Nations General Assembly has from time to time passed resolutions calling upon the colonial powers to take action without further delay to implement the declaration of independence for colonial people and countries, These resolutions have fallen on deaf ears. The reason is obvious that they do not wish to withdraw themselves from their colonies. For example, Great Britain even the most liberal colonial power having an interest in Gibraltar, Aden and Hongkong, will not be prepared to vacate or eschew colonialism, in spite of her being a party to the resolutions of the United Nations General Assembly subject. In this state of affairs India was perfectly justified in using the minimum force with a view to regaining her own territory and

protecting her independence and sovereignty.

Lastly, the action of India in liquidating Portuguese imperialism cannotbe termed aggression under the International Law. Aggression has been charact criscal by the International Law Commission as an offence against the peace and security of mankind and embraces any act of aggression, including the employment by the authorities of a state of armed force against another state for any purpose other than national or collective self-defence. The aggressor nation was Portugal which was occupying the Indian territory by force. India used the minimum force for her own national security and self-defence which had been threatened by the occupation of Indian territory by Portugal, a country which has military alliances with other countries. "The forcible expulsion from the soil of a pocket of colonialism which was established by force is not an aggression. Portuguese imperialism was the original aggressor against the people of India and the rights of an aggressor in occupation of another's soil cannot be higher than that of a trespasser in municipal law. Conquest and adverse possession confer no right to rule human souls who do not wish to be ruled by a conqueror sitting 5000 miles away. If it did, three-fourths of the human race would still be the slaves of the remaining one-fourth. Unfortunately, international law as developed by the jurists of the N. A. T. O. powers provided no remedy for the peaceful ejectment of a colonial trespasser. In such circumstances, the victim of trespass or aggression had the right to restore the status que before the act of trespass. India had invited the trespasser to quit peacefully before ejecting him." In short, India's liberation of a portion of Indian territory from Portuguese rule can never be termed aggression. She cannot be guilty of aggression against herself.

Original and Derivative Methods

It will appear from a review of the above that of the five common modes of acquiring territory cession is a derivative mode of acquisition of territory, while occupation, prescription, accretion and conquest are original modes of acquiring territory. According to Schwarzenberger, conquest forms a hybrid between the two forms of acquisition of territory, vizoriginal and derivative and, apart from exceptional cases, is not a title to territory, unless followed by cession.2

Occupation as a mode of acquisition of territory differs from conquest inasmuch as in the latter the territory belonged to another State, while in the

<sup>1.</sup> Extract from the observations of the Hon, Mr. Justice S. S. Dhavan-2. Schwarzenbegrer: A Manual of International Law, p. 49

former sovereignty is established over such territory as is at the time not under the sovereignty of another State or that which is res nullius.

Occupation differs from cession, inasmuch as through the latter the acquiring State receives sovereignty over the territory concerned from the former owner-State by means of a treaty, while in the former sovereignty is established over a territory which is res nuitius. Cession is as such a derivative mode of acquisition, while occupation is an original mode of acquiring territory.

And, lastly, the distinction between cession and conquest may also be noted. When a military force occupies a State territory by conquest, which is confirmed by a treaty of peace at the end of the war, the legal title to the territory arises from cession and not conquest.

- 6. Adjudication or Award.—Starke mentions an additional mode of acquisition of territorial sovereignty, namely adjudication or award by a conference of States. This occurs where a conference of the victorious powers at the end of a war assigns territory to a particular State in view of a general peace settlement. The territorial redistribution of Europe at the Versailles Peace Conference, 1919, is an instance in point.
- 7. Leases.—There is yet another method of acquiring territory. It is by means of leases. The leasing by China in 1898 of Kiaochow to Germany, Wei-Hai-Wei and the land opposite the island of Hong Kong to Great Britain, Kuang Chou Wan to France and Port Arthur to Russia for 25 years, and the leasing of the Panama Canal Zone by the Republic of Panama in 1903 to U. S.A. in perpetuity afford examples of acquisition of territory by this mode. Another example of lease is furnished by an agreement between Great Britain and the United States, whereby the former on March 27, 1941, leased to the latter, in exchange for the transfer of certain American destroyers, a number of naval and air bases in the Caribbean Sea and adjacent waters, viz., Newfoundland, Bermuda, Jamaica, St. Lucia, Antigua, Trinidad and British Guiana, for a period of 99 years.

In case of lease the terms of the treaty determine the amount and nature of authority that can be exercised by the lesser over the leased territory. But usually the sovereignty of the lessor State, although resting legally with the lessor State, is more nominal than real.

Spheres of Influence.—Analogous to acquisition of territory by the different modes discussed above there is a minor right over a territory due to 'sphere of influence' introduced by colonial protectorates. According to Pitt Cobbet, it indicates a region generally inhabited by races of inferior civilisation, over which a State seeks, by compact with some other State or States that might otherwise compete with it, to secure to itself an exclusive right of making future acquisitions of territory and generally, also, the direction and control of the native inhabitants. According to Brierly "the very purpose of this device was that its incidents should be vague and it means no more than that a State, without establishing its jurisdiction or undertaking any responsibility for securing good government, signifies that it regards certain territory as closed to the ambitions of any other power, probably because it intends some day to convert it into a colony or protectorate, or because it regards it as strategically necessary to the security or part of its existing dominions." This

<sup>1.</sup> Brierly : The Law of Nations, 5th Ed., p. 159

arrangement neither confers any territorial rights nor imposes any responsibility on the State in whose favour it is created in relation to non-contracting States. The arrangement is a political act and has no legal significance. It also does not confer any prescriptive right.

Loss of State Territory.—The five common modes of acquiring territory also correspond to those of losing it. Territorial sovereignty may, therefore, be lost by dereliction (which corresponds to occupation as a mode of acquisition), prescription, operations of nature (which correspond to accretion as a mode of acquisition), cession and conquest. To these five modes of loss of State territory may be added a sixth method, viz revolt.

Cession.—On the acquisitive side cession is the transfer of sovereignty over the territory of a State by its owner to another State. What the acquiring State thus gains is a loss to the ceding State.

Operations of Nature.—This method corresponds to accretion as a mode of acquiring the territory. As in the case of accretion, the territory of a State may be diminished or lost by natural actions. An island near a shore may disappear by volcanic actions or a piece of land attached to a State may be detached by the current of a river and annexed to another riparian State. These operations of nature result in loss of territory to a State.

Subjugation and Prescription.—A State may lose territory by its annexation by a victorious State with the intention of incorporating it into its own territory. In the same way undisturbed possession of the territory of one State by another during a certain period of time causes its loss to the former. According to Kelsen these two modes of acquisition of territory are in violation of International Law.

Dereliction.—It corresponds to occupation on the acquisitive side. It frees a territory from the sovereignty of the present owner-State and is completed by abandoning the territory by the owner-State with an intention of withdrawing from it or relinquishing sovereignty over it. Dereliction to be complete must comprise the actual abandonment of a territory and the intention of giving up sovereignty.

Revolt.—Revolt followed by secession of a part of the territory of the owner-State is a mode of losing territory. The examples of secession of territory by means of revolt are to be found in Netherlands breaking off from Spain in 1579, U. S. A. from Great Britain in 1776, Brazil from Portugal in 1822 and Belgium from Netherlands in 1830.

The question at what time a loss of territory through revolt is perfected is difficult to answer. Recognition of the territory acquired by a belligerent or insurgent is one of the ways which puts the stamp of the loss of the territory by revolt. But it may just happen that the mother country may not regard the territory to be lost or recognition may be made by some of the States only. The Chou En-lai's Government in China, otherwise known as the Red Chinese Government, which had been recognized by several States but not by all or even by a majority of States, afforded an example of the uncertainty that prevailed even in case of recognition by a few States. But it has to be remembered that belligerency or loss of territory through revolt is a question of fact and is not largely dependent upon the will of the recognizing State. Thus the Red Chinese Government, even when not a member of the United Nations, constituted the de facto Government of a preponderatingly large part of China and the Nationalist Chinese Government led by Chiang Kai-shek, though then a member of the United Nations, was not the real Government of China.

### CHAPTER XVII

### JURISDICTION

A State has jurisdiction over all persons and things within its territory. Such persons may be natural born subjects, naturalised subjects or domiciled aliens. With regard to things they include all property under the control of the State. Its jurisdiction also extends over its own ship in its territorial waters and ports and over all acts committed on them. It has also jurisdiction over its harbours and territorial waters. Its jurisdiction with regard to these persons and things is exclusive and absolute within its territorial supremacy.

With regard to its territorial waters, as pointed out in an earlier chapter, ships of foreign States have a right of innocent passage. The littoral power has no doubt absolute jurisdiction with regard to revenue, fishery, police powers or sanitation rights in such territorial waters.

The Hague Codification Conference (1930) laid down rules for the exercise of civil and criminal jurisdiction by the coastal State. Articles 8 and 9 provided that a foreign vessel was granted immunity in the territorial waters of a State in respect of crimes committed by persons on board the vessel. But the immunity did not extend if the consequences of the crime extended beyond the vessel, if the crime committed was so serious that it affected the peace and order of the coastal State or if the captain of the ship or the consul of the country to which the vessel I elonged asked for the assistance of the local authorities. A coastal State was also prevented from arresting or diverting a foreign vessel passing through the territorial sea for the purpose of civil jurisdiction in relation to a person on board the vessel.

Jurisdiction on the Open Sea .- According to Higgins and Colombos, "the high seas are generally described as so much of the ocean as is exterior to a line running parallel with the shore and some distance therefrom,"1 Oppeneim describes the open sea, or the high seas, as the coherent body of salt water all over the greater part of the globe, with the exception of maritime belt and the territorial straits, gulfs, and bays, which are part of the sea but not parts of the open sea.2

The open sea, apart from territorial waters, is not under the sway of any State. Its freedom is now settled as an accomplished fact. It is an unquestionable proposition of international jurisprudence that the high seas are of right navigable by the ships of all States, the reason being that the open sea is incapable of continuous occupation and unsusceptible of permanent appropriation and also because the use of it is inexhaustible and therefore common to all mankind. The liberty of navigation is a fact recognized by all civilised states.

"The ocean", observes Burgh, "is common to all nations for purposes of commerce and as a means of intercourse amongst mankind." According to Grotius: "All property is grounded upon occupation which requires that movable shall be seized and immovable things shall be enclosed; whatever therefore cannot be so seized or enclosed is incapable of being made a subject of property. The vagrant waters of the ocean are thus necessarily free. The right of occupation, again, rests upon the fact that most things become

<sup>1.</sup> International Law of the Sea, 2nd Ed., p 38. 2. International Law, Vol. I, 8th Ed., p. 587.

<sup>5.</sup> W. D. Bargir; The Elements of Maritime International Law, p. 1. 23

exhausted by promiscuous use and that appropriation consequently is the condition of their utility to human beings But this is not the case with the sea; it can be exhausted neither by navigation nor by fishing, that is to say, in neither of the two ways in which it can be used." The above principle received recognition in the case of Le Louis2 when Lord Stowell summed up the rule: "All nations have an equal right to the unappropriated parts of the ocean for their navigation." The rule was followed by Story, J. in the Marianna Flora3 when he said: "Upon the ocean, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all, and no one can vindicate to himself a superior or exclusive prerogative there."

A State can, however, exercise jurisdiction on the high seas in the following matters:

- In respect of its vessels and the things and persons thereon. 1.
- In respect of piratical acts.
- In respect of a foreign vessel wrongfully flying its flag.
- In respect of the right of visitation and search of neutral mer chantmen by a belligerent to ascertain if they are attempting to break blockade or are carrying contraband or rendering unneutral services to the enemy.
- 5. In respect of the right of 'hot pursuit' on the open seas in peace time when foreign vessels after having committed some breach of the local law within its territorial waters escape to the open sea, provided they are chased immediately.

Legal conceptions on the freedom of the high seas .- There are two different views with regard to the legal conceptions on the freedom of the high seas. The first is that the high sea is a thing belonging to nobody, i.e., it is res nullius on the ground that sovereignty is conspicuous by its absence on the high seas. The second is that high sea is a thing belonging to everybody, i.e., it is res communis on the ground that the sea is a necessary instrument to international navigation and trade and as such common to all. Both the views are not free from comment. Fauchille observes that if it be admitted that the sca is res nullius, this in Roman Law signified that the thing, though unowned, was capable of ownership, which is not the case with the high seas. On the other hand, if the sea Le regarded as a res communis, this means that all the States are owners in common, it being the property of the collectivity of States. But community of ownership, he observes, means the possibility of partition and so of separate ownership. Fauchille, therefore, concluded that the right view is that the usage of the sea remains eternally open to all the nations. Higgins and Colombos share this view when they observe that the legal position of the high sea is lased on the conception that it is common and open to all nations.4

The Institute of International Law sun med up the principle of the freedom of the sea as implying the following consequences: (i) freedom of navigation on the high seas, subject to the exclusive control in the absence of a convention to the contrary, of the State whose flag is carried by the vessel; (ii) freedom of fisheries on the high seas, subject to the same control;

<sup>1.</sup> Grotius : Maer libarum.

<sup>2. 2</sup> Dods 240, 243. 3. 1326) Who ton, 1, 43.

<sup>4</sup> International Law of the Sea, p. 51

(iii) freedom to lay submarine cables on the high seas; and (iv) freedom of aerial circulation over the high seas. 1

Public Ships .- Public ships in foreign ports are exempt from the local jurisdiction, though they are subject to local regulations of the port. A ship bearing the national flag of the State is for purposes of jurisdiction regarded as the floating territory of that State, whether the ship is on the high seas or within foreign territorial waters. This topic has been discussed in detail in a subsequent chapter.2

National Vessels .- Generally speaking, it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants: Museat Dhows Case [(1905), Tribunal of the Permanent Court of Arbitration of the Hague]. Every vessel which is documented, owned, or controlled in the United States, and every vessel of foreign registry which is, directly or indirectly, substantially owned or controlled by any citizen of, or corporation incorporated, owned or controlled is, the United States, shall, for the purposes of the Anti-Smuggling Act of 1935, be deemed a vessel of the United States.

In Public Procurator v. Ho Ch'ih-Nung, Wu-chi-nien,3 the District Court of Taipei, Taiwan, sentenced the defendant, a seaman serving on the S. S. Hsiang-yun, a vessel operated by the China Navigation Co., Ltd., for having left the vessel without permission at Baltimore. On the question of jurisdiction the Court observed: "Since an offence committed on board a vessel of the Republic of China cutside the territory of the Republic of China shall be considered an offence committed within the territory of the Republic of China, the defendant's commission of an offence abroad shall be punished in accordance with the law of the Republic of China."

Piracy.—A State has jurisdiction over all pirates seized by its vessels. Piracy is an act of robbery on the seas or an armed violence at sea which is not a lawful act of war. Such acts are not authorized by any sovereign State. It is a crime in International Law as it is an offence against the whole body of civilized States and is not directed against any particular State.

Fisheries in the Open Sea .- On account of the freedom of the open sea it is clear that the fisheries thereon are open to vessels of all nations. Fish and marine mammals are not "property" until caught and hence every State is empowered to legislate for the exercise of the right of fisheries by its vessels on the open sea. It is, however, recognised that unlimited fishing at all seasons might seriously deplete the seas of fish. This has necessitated the various Conventions (e.g., The North Seas Convention of 1882, Behring Sea Seal Fisheries Convention, 1911, Washington Convention for the Preservation of 'Sockeye' Salmon and Whales, 1930, the Protocol on the International Regulation of Whaling, (1944) for the regulation of fisheries.

In the case of maritime belt, however, the littoral State has full liberty to reserve the fisheries to its own subjects.

Bed of the Sea .- It has been held in successive cases by British Courts that the Crown is the owner of the bed of the sea. It was observed by Parker, J

 Lausanne Conference, 1927.
 See post, Chap. XIX, "Jurisdiction over Public and Private Vessels."
 [1968] itzu No. 8672; Aug. 22, 1968: Cff. The American Journal of International Law, vol. 64 (1970), p. 708.

in Lord Fitzhardinge v. Purcell<sup>1</sup> that clearly the bed of the sea, at any rate for some distance below low-water mark, and the beds of tidal navigable rivers, are prima facie vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership.

To the same effect are the observations of Lord Watson in Lord Advocate v. Wemyss<sup>2</sup>: "I see no reason to doubt that by the law of Scotland the solum underlying the waters of the ocean, whether within the narrow seas or from the coast outward to the three mile limit, and also the minerals beneath are vested in the Crown."

On the basis of the above two cases Lord Shaw observed in the case of Secretary of States for India v. Chellikami Rama Rao<sup>3</sup>: "The Crown is the owner, and the owner in property of islands arising in the sea within the territorial limits of the Indian Empire. It should be added with reference to the suggestion that the territory of the Crown ceases at low water-mark and that the right over what extends seawards beyond is merely of the nature of jurisdiction or the like, that there are manifest difficulties in seeing what are the grounds for this principle. There is nothing to recommend a local jurisdiction over a space of water lying above a "res nullius". As to practical results, the confusion that might be produced by leaving islands emergent within the three-mile limit to be seized by first comer is obvious."

Summing up his conclusions in his authoritative treatise, Sir Cecil Hurst observes: "So far as Great Britain at any rate is concerned the ownership of the bed of the sea within the three-mile limit is the survival of more extensive claims to the ownership of and sovereignty over the bed of the sea. The claims have become restricted by the silent abandonment of the more extended claims. Consequently, where effective occupation has been long maintained of portions of the bed of the sea outside the three-mile limit, those claims are valid and subsisting claims, entitled to recognition by other States."

"The claim to the exclusive ownership of a portion of the bed of the sea and to the wealth which it produces in the form of pearl oysters, chanks, coral, sponges or other fructus of the soil is not inconsistent with the universal right of navigation in the open sea or with the common right of the public to fish in the high seas."

Subsoil under the Sea.—The old theory that since the high sea is the property of no state, therefore the bed and the subsoil beneath the bed of the open sea cannot come under the sway of any State has now been discarded. The modern practice with regard to the appropriation of the continental shelf admits that the sub-soil beneath the bed of the high seas can be occupied by the coastal state to exploit its resources, to construct mines or tunnels and the like. Although no rules have so far been formulated which could be termed as law governing States, yet the practice of States regards the exploitation of the sub-soil beneath the sea-bed as perfectly justified in accordance with the spirit of the modern age. Thus the coal mines of Comberland (in Great Britain) by means of the process of underwater excavation have been extended to such a large extent that a portion of the subsoil beneath the bed of the high seas meets with the mines. Again France and Britain had long

3. (1916) 39 Indian Reports, Madras Ser. 617.

 <sup>(1908) 2</sup> Ch. 39, 166.
 (1900) A. C. 48, 66.

<sup>4.</sup> Sir Cecil J. B. Hurst: International Law-The Collected Papers, p. 61.

contemplated to construct a tunnel between the two States under the bed of the English Channel and though the proposed project could not be accomplished because of the lack of popular interest over the whole matter, no states have ever challanged the legality of such a desire.

According to Oppenheim, the following five rules, which are not exhaustive, commend themselves with regard to this more limited aspect of the question.

- 1. The subsoil beneath the bed of the open sea is no man's land, and it can be acquired on the part of a littoral State through occupation, starting from the subsoil beneath the bed of the territorial maritime belt.
- 2. This occupation takes place ipso facto by a tunnel or a mine being driven from the shore through the subsoil of the maritime belt into the subsoil of the open sea.
- 3. This occupation of the subsoil of the open sea can be extended up to the boundary line of the subsoil of the territorial maritime belt of another State, for no State has an exclusive claim to occupy such part of the subsoil of the open sea as is adjacent to the subsoil of its territorial maritime belt.
- An occupation of the subsoil beneath the bed of the open sea for a purpose which would endanger the freedom of the open sea is inadmissible.
- It is likewise inadmissible to make such arrangements in a part of the subsoil beneath the open sea which has previously been occupied for a legitimate purpose as would indirectly endanger the freedom of the open sea.

Atomic Tests over High Seas.—The conducting of nuclear experiments over high seas is a clear violation of the International Law. Among the principles laid down by the International Law Commission one is that high seas were open to all nations and no nation might validly purport to subject any part of them to its sovereignty. From this it follows that the right to exercise sovereignty on the open sea is denied by law whatever the period and whatever the area. When a nation engaged in nuclear experiments declares an area of the open sea as prohibited area, it in effect reserves that area for its own uses, appropriates it and exercises dominion over it. This is subjecting part of the sea to its own sovereignty and such claims to sovereignty are opposed to whole history and development of law during the past few centuries.

Peaceful uses of sea bed.—On December 21, 1968, the United Nations General Assembly adopted a resolution on reservation of sea-bed and ocean floor for peaceful purposes. It recognised that it is in the common interest of all nations that the exploration and exploitation of the resources of the sea-bed and the ocean-floor, and the sub-soil thereof, should be conducted in such a manner as to avoid infringement of the other interests and established rights of nations with respect to the uses of the sea.

In 1969, the General Assembly declared that, until an international agency was established, no State shall exploit the resources of the seabed and ocean floor beyond national jurisdiction.

Oppenheim: International Law, Vol. 1, p. 630.

Imperial Jurisdiction over Nationals.—A State can exercise personal jurisdiction over its nationals for acts committed abroad when such nationals return again within the jurisdiction of the State. In Earl Russel's case¹ Earl Russel, a British peer, married in England and subsequently married in Nevada during the life-time of his first wife, after having obtained an order of divorce from the Courts of Nevada. He was indicted for bigamy and convicted. It was held there that the imperial jurisdiction was independent of place and depended on the national character of the person over whom it was exercised.

Many States, however, claim jurisdiction over the acts of foreigners committed abroad when they enter their territory. Such jurisdiction is claimed only in respect of offences which endanger their security and affect their credit or nationals.

Civil and Criminal Jurisdiction.—States also claim jurisdiction over foreign private vessels in respect of criminal acts as also in respect of municipal offences committed by them in their territorial waters but escaping to the high seas. Civil jurisdiction extends to obeying the harbour regulations and quarantine rules. If any private vessel is driven by distress of weather or vis major, i.e., by an act of God, the local law of the port is also not applied to it. But the ship must not violate any law of the coastal State.

Merchant vessels in foreign ports have also no immunity from a civil suit in rem brought by a citizen of the foreign State and the officers and crew of the vessel are also not immune from a civil suit in personam or from criminal prosecution by the foreign Government for contravening the State laws. The American courts claim jurisdiction in respect of foreign merchant vessels if the offence is a serious one.

In the case of Greole<sup>2</sup> the American vessel was carrying slaves to New Orleans. As there was a mutiny on board the ship many crew were killed by the slaves. The ship entered the port of Nassau on account of weather conditions. Slavery was an offence in Nassau and accordingly the British authorities at the port detained some of the slaves for murder and set free rest of them. On a protest made by the American Government the matter was referred to arbitration where it was held that the authorities of Nassau acted in violation of the established law of nations in liberating a number of slaves who had revolted against the officers of the ship.

In the case of the S. S. Lotus<sup>3</sup> jurisdiction was claimed by Turkey over an act committed on the open sea by a French steamship the effect of which was produced on board the ship of the former State. The facts of the case, shortly stated, were that on August 2, 1926, a collision occurred between the French mail steamer Lotus and the Turkish collier Box Kourt, resulting in the loss of the latter and the death of eight Turkish nationals who were on board. When the Lotus arrived at Constantinople the Turkish Government instituted joint criminal proceedings against the captain of the Turkish vessel and the French officer of watch on board the Lotus on a charge of manslaughter, and they were both sente seed to imprisonment. The French Government made diplomatic representations for the release of the French officer and claimed exclusive jurisdiction over acts committed on its ships on the high seas. The Turkish Penal Code had, however, provided for jurisdiction over foreigners who committed acts against Turkey or Turkish subjects. The dispute as to jurisdiction was referred by agreement to the Permanent Court of interna-

<sup>1. (1901)</sup> A. C. 446.

Moore: International Arbitrations, IV. 4375.

<sup>3</sup> Pub. P. C. 1. J. (1927) Series A No. 10.

tional Justice at The Hague. The Court by the casting vote of the President held that Turkey had not acted in conflict with the principles of International Law in instituting criminal proceedings against the French officer because the act committed on board the Lotus produced its effect on board the Boz Kourt flying the Turkish flag and consequently in a place assimilated to Turkish territory in which the application of the Turkish Criminal Law could not be challenged even in regard to offences committed there by foreigners. The Court also expressed the opinion that there was no rule of International Law prohibiting the State to which the ship on which the effects of the offence had taken place belonged from regarding the offence as having been committed in its territory and accordingly prosecuting the delinquent. The Court observed:

"The Courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effect have taken place there. French Courts have, in regard to a variety of situations, given decisions sanctioning this way of interpreting the territorial principle. Again, the Court does not know of any cases in which Governments have prot sted against the fact that the criminal law of some country contained a rule to this effect or that the Courts of a country construed-their criminal law in this sense."

The same principles were laid down in the case a of Ford v. United States<sup>1</sup> where it was held that British subjects, upon seizure of their vessel, might be prosecuted for conspiracy to violate the laws of the United States whether or not they were in or out of the country at the time of the offence.

In the case of Chang Chi Cheung v. The King, 2 Lord Atkin while delivering the decision of the Privy Council observed that the immunities granted to public ships and the naval forces extended to the internal disputes between the crew and that the local courts would not exercise jurisdiction over offences committed on board ship by one member of the crew upon another unless the flag-sovereign elected to waive jurisdiction.

In another case Joyce v. Director of Public Prosecutions<sup>3</sup>, the facts of which were slightly dissimilar, even the House of Lords in 1945 upheld the conviction of William Joyce, popularly known as Lord Haw Haw, for high treason, although he was born in the United States. He had in September 1939 entered in the service of the German Radio Company of Berlin as an announcer of British news. He had resided in England between 1921 and 1939, when he applied for the passport describing himself as a British subject born in Ireland. The House of Lords held that, although William Joyce was not in law a British subject, he had by his own act maintained the bond which, while he was within the realm, bound him to his sovereign.

Position of foreigners in a foreign State.—A State has as much jurisdiction over foreigners as over its own citizens. This rule has been recognized because a foreigner cannot disobey the laws of the State where he happens to reside, though temporarily. But the State cannot claim a right

<sup>1. (1927 273</sup> U.S. 592.

<sup>2. (1939)</sup> A. C. 160. 3. 1946 A. G. 347.

to try a foreigner for what he had done in his own country before his arrival in the foreign State. In the Cutting case there arose a dispute between the United States and Mexico. Cutting was an American national. He had published an article in America against a Mexican citizen, then in Mexico. The Mexican Government arrested Cutting when he went to Mexico in 1886 for his writing on a previous occasion, which amounted to libel. The United States Government demanded his release as the offence of Cutting did not commence and was not completed in Mexico and contended that the Mexican Government had no jurisdiction. The Mexican Government acceded to the viewpoint of the United States.

Exterritoriality.-The exception to the rule that a State has as much jurisdiction over foreigners as over its own citizens is provided by the exterritoriality of States. It is a legal fiction by which certain persons and things are deemed for the purpose of jurisdiction and control to be outside the territory of the State in which they really are, and within that of some other State. The right of exterritoriality is founded upon the principle that it would be inoffensive to a State if its legal states could be determined by the courts of a co-ordinate State. Such immunities from territorial jurisdiction are granted to the following :

(1) Sovereigns whilst travelling or resident in foreign countries.— This privilege is extended to sovereigns even when they are living in another State incognito. In the British case of Mighell v. Sultan of Johore, decided in 1893, the plaintiff Mighell brought a suit for breach of promise of marriage against the defendant, Sultan of Johore, who had been living incognite under the assumed name of Albert Baker. Upon being sued, the defendant disclosed his real character as Sultan of the independent State of Johore in the Malay Peninsula, whereupon the Court dismissed the proceedings for want of jurisdiction. Lord Esher M. R. observed in the case: "The principle.....is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its court any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction."

In the case of Statham v. Statham and the Gaekwar of Baroda2 one George Wellington Statham prayed for dissolution of his marriage on the ground of the adultery of his wife Beatric Alice Statham with the Gaekwar of Baroda, who was impleaded as a co-respondent in the suit. The co-respondent objected to his being impleaded and prayed for the dismissal of the suit on the ground that he was a reigning sovereign, not amenable to the jurisdiction of the Court. The Court, relying on a certificate from the India Office that the Gackwar of Baroda though not independent exercised as a ruler of a State the attributes of sovereignty accepted the objection and dismissed the suit.

(2) Foreign States.—A foreign State cannot be made a party to a proceeding in some other State. In the case of the Cristina 3 it was observed by Lord Wright that there are general principles of International Law according

L. R. (1894) 1 Q. B. Div. 149
 (1912) P. 92.
 (1938) A. C. 485.

to which a sovereign State is held to be immune from the jurisdiction of another sovereign State. This is sometimes said to flow from international comity or courtesy, but may now more properly be regarded as a rule of International Law, accepted among the community of nations. This rule, however, does not apply in case of companies which are wound up and in whose assets a foreign State sovereign has an interest.

In the case of the Cristina the observations of Lord Sumner in Duff Development Company v. Kelantan Government were quoted with approval : principle is well settled that a foreign sovereign is not liable to be impleaded in the municipal courts of this country, but is subject to their jurisdiction only when he submits to it, whether by invoking it as a plaintiff or by appearing as a defendant without objection."

Lord Atkin further observed in the Cristina that the two propositions of International Law engrafted into our domestic law which seem to be well established and to be beyond dispute are : The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the procedings involve process against his person or seek to recover from him specific property or damage. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.

The English courts will not implead an independent sovereign State, against its will. Where such a State has made a written contract with a contractor, and, by that contract, the State, in express terms, has agreed to submit, for the purposes of the contract, to the jurisdiction of the English courts (both parties agreeing that the interpretation and effect of the contract shall be construed and governed by English law and that for the purposes of the proceedings the contract shall be deemed to have been made in England and to have been performed in England), when subsequently the contractor alleges breaches of the contract by the independent sovereign State and issues a writ against it, claiming redress, that State can resile from its agreement to submit to the jurisdiction and claim and secure immunity. Although the independent sovereign State has broken its agreement to submit to the jurisdiction, it has not given jurisdiction to the English courts, since the agreement to submit is one made inter partes, and is not an actual submission made by the State, that is, an undertaking given to the court at the time when the other party asks the court to exercise jurisdiction over it.2

A foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party and in which it alleges that it is indirectly impleaded, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached. The view of Scrutton, L. J. in The Jupiter3 that a mere assertion of a claim by a foreign government to property the subject of an action compels the court to tay the action and decline jurisdiction was against the weight of authority

 <sup>(1924)</sup> A. C. 822.
 Kahan v. Pakistan Federation, (1951) 2. K. B. 1003: 7 B. I. L. G., 689.

<sup>3. (1924)</sup> P. 235.

and could not be supported in principle: Juan Ysmael and Company Incorporated v. Government of the Republic of Indonesia.1

In Dollfus Mieg et Compagnie v. Bank of England2 the facts were that the ·Bank of England held, as bailed for the Governments of the United States, France and the United Kingdom, 64 numbered gold lars claimed to be the property of a French company. The bars had been wrongfully seized by the German authorities during the second world war and taken to Germany. After their recovery by Allied forces they were lodged with the bank by the governments for safe custody pending their ultimate disposal. Jenkins, J. in the Chancery Division held that the gold, notwithstanding its delivery to the bank, must be regarded as still in the possession of the three governments for the purposes of the doctrine of immunity; that the court had no jurisdiction to entertain the plaintiff company's action; and that the motion by the Bank succeeded. He referred to the observation of Brett, L. J. in The Parlement Belge3: "To implead an independent sovereign in such a way is to call upon him to sacrifice his property or his independence. To place him in that position is a breach of the principle up n which his immunity from jurisdiction rests", and said that, although the observation was made in relation to an Admiralty action in rem, it applied with equal force to an action in personam of the type postulated above.

On appeal, the Court of Appeal made a further discovery that between December 30, 1948, and January 26, 1949, and after the issue of the writ in action, thirteen of the sixty-four gold bars had been sold by mistake. In view of this fact the Court of Appeal held that having regard to the sale in error of the thirteen gold bars, the bank could not invoke the rule of sovereign immunity; that it was also impossible for the same reason for the bank in the present application to assert that any of the sixty-four bars had at any relevant date been in the possession or control of the three governments; and that the action must be allowed to proceed.4

Subsequently the Bank of England applied to the Court of Appeal for the postponement of the drawing up of its order to enable the governments of the United States of America and the Republic of France to be joined as defendants in the action. The Court declined; and these governments then presented a petition to the House of Lords for leave to appeal although they were not parties to the action and, alternatively, for an order adding them as defendants.

The House of Lords held that the action must be allowed to proceed as regards the 13 bars, since the bank had by its own act terminated the bailment, but that the action must be stayed as regards the remaining bars since the doctrine of the immunity of a foreign sovereign applied to the case of a claim to recover property in the hands of a bailee for a foreign sovereign.

The House of Lords agreed with Jenkins J. in thinking that the fact that the foreign governments had the immediate right to possession of the 64 bars made it impossible, consistently with the established principle of English law relating to State immunity, for relief to be given in this action by ordering the delivery up of the bars or by granting an injunction restraining the bank from parting with their possession; for if either of these courses were taken it

<sup>1. (1955)</sup> A. C. 72: 7 B. I.L.C., 72: 2. (1949) Ch. 369: 7 B. I. L. C. 736. 3. 5 P. D. 197; 219.

<sup>4 (1950)</sup> Ch. 333 : 7 B. I. L. C. 751,

<sup>5.</sup> United States of America and Republic of France v. Dollfus Mieg et CIE. S. A. and Bank of England (1952) A. C. 582: 7 B. I. L. C. 778.

would be necessary for the foreign governments to take proceedings in this country if they wanted to recover the gold here.

As to the 13 gold bars which the bank had sold wholly different considerations applied; and it was conceded that the doctrine of immunity would not extend to afford any protection to the purchasers of the bars. The Bank, by its own act, had put an end to the bailment which alone afforded the protective umbrella of immunity.

A suit against a foreign Republican State (the United Arab Republic) claiming damages for breach of contract is barred by the general principles of International Law, which now form part of the Indian Law. The decisions of English Courts are uniform that in a personal action the immunity of a foreign State is absolute, unless it submits to the jurisdiction either by invoking it as a plaintiff or 1y appearing as a detendant without objection. The doctrine of restricted immunity based on the distinction between jure imperit and jure gestions (sovereign and non-sovereign acts) cannot be accepted as the positive International Law of our country. The only restriction to the immunity of a foreign State recognised by the law of our country is that enacted by S. 2 of the Government Trading Taxation Act, 1962, and S. 86 (2) (b) of the Code of Civil Procedure. Where there is no allegation that the defendant 'trades' within the local limits of the Calcutta High Court it does not fall within the exception and is entitled to immunity. 1

- (3) Ambassadors and other diplomatic agents.—The immunity is absolute in the case of criminal jurisdiction but qualified in civil jurisdiction for the diplomatic agents can waive the immunity from civil jurisdiction. The immunity extends to the family of the diplomatic agents and their suites.
- (4) Public vessels whilst in foreign ports or territorial waters—In the case of Schooner Exchange v. Mc Faddon<sup>2</sup> the Exchange was a vessel owned by two American citizens, which had been seized by officers of the Emperor Napolean in December 1810 and commissioned as a public vessel of France. When the vessel arrived at the port of Philadelphia, a suit was brought by the original owners. The Supreme Court held that, although the vessel had originally belonged to American citizens, nevertheless the public character of the vessel now exempted it from the jurisdiction of the American Courts.

In the case of the Parlement Belge<sup>3</sup> the Court of Appeal of England reversing the judgment of the High Court of Admiralty held that a publicly owned vessel of the State of Belgium was exempt from a suit in rem for damages arising out of a collision.

According to Oppenheim: "It is a customary rule of the law of nations that men-of-war and other public vessels of any State are, whilst on the open sea as well as in foreign territorial waters, in every point considered as though they were floating parts of their home States." A public armed ship constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign, and as such it is a principle of public law that national ships of war entering the port of a friendly power open for their reception are to be considered as exempted by the consent of that power from its jurisdiction.

2. (1812) 7 Cranch. 116. 3. (1880) L. R. 5 P. D. 197.

<sup>1.</sup> United Arab Republie v. Mirza Ali Akbar Kashani, A. I. R. 1962 Gal. 387.

(5) The armed forces of a State when passing through foreign territory.—A State which admits to its territory an armed force of a friendly foreign power impliedly undertakes not to exercise any jurisdiction over the force collectively or its members individually which would be inconsistent with its continuing to exist as an efficient force available for the service of its sovereign.

The North Atlantic Treaty Organization led to the stationing of troops in foreign countries, who are parties to the pact. According to the terms of the agreement both the sending and receiving States enjoy concurrent jurisdiction over the members of a visiting force of a North Atlantic Power. The sending State has however the primary right to exercise jurisdiction, even in cases of concurrent jurisdiction, in regard to offences solely against the property or security of the sending State or against the person or property of the members of the force or offences a ising out of any act or omission in performance of official duty.

(6) Foreigners of European or American extraction, when resident in certain eastern States where the standards are different from or inferior to the western countries.—They are exempted from territorial jurisdiction or the authority of the native Courts and are usually placed under the jurisdiction of the Consular Courts. The U. S.-Japan Security Pact of February 28, 1952, provided for the United States Service Courts in Japan to retain exclusive jurisdiction over United States personnel and their dependents.

With the independence of Eastern States and growing consciousness of their right of self-determination, such immunities to Europeans or Americans are becoming almost non-existent.

(7) International Institutions.—International institutions such as the United Nations and its various branches have been conceded immunity from territorial jurisdiction.

Judicial Power of States.—Wheaton observes that the judicial power of every independent State extends, with the qualifications mentioned above,—

- (1) to the punishment of all offences against the municipal laws of the State, by whomsoever committed, within the territory;
- (1) to the punishment of all such offences, by whomsoever committed, on board its public and private vessels on the high seas, and on board its public vessels in toreign ports;
- (3) to the punishment of all such offences by its subjects, wheresoever committed; and
- (4) to the punishment of piracy and other offences against the law of nations, by whomsoever and wheresoever committed.

#### CHAPTER XVIII

## QUALIFIED JURISDICTIONAL IMMUNITY OF ARMED FORCES ON FOREIGN TERRITORY

There are several occasions when the armed forces of a State may be stationed on foreign territory. A state may enjoy a privilege to keep its troops in a foreign fortress under an agreement or may keep its forces after the conclusion of peace as a guarantee for the execution of the treaty of peace. After the conclusion of the Second World War the Western Allies maintained their forces in Germany even till after 1952. A State may as well obtain permission by treaty for the passage of its troops through the territory of another State for purposes of sending relief to garrisons.

Offences within the camp.—According to one view the armed forces of a State on foreign territory are considered as ex-territorial upon the fiction that for purposes of jurisdiction they are considered as withdrawn from the jurisdiction of the visiting State by a rule of International Law. According to this view "a crime committed on foreign territory by a member of these forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of their home State in cases where the crime is committed either within the place where the force is stationed or in some place where the criminal was on duty. This rule does not apply, if, for example, soldiers belonging to a foreign garrison of a fortress leave the rayon of the fortress, not on duty but for recreation and pleasure, and then there commit a crime."

In re Gilbert, where a member of the United States force had been accused before a Brazilian court on a charge of having shot and killed a local inhabitant while the accused was on sentry duty immediately outside the gate of the camp, the learned Judge relied on the conclusion of Podestea Costa, an eminent Argentinian jurist, who had found the key to the problem in the theory of interest. In his view this test showed that the military authorities of the visiting force were principally, if not solely, affected by the commission of a crime within the confines of the camp, and for that reason they and they alone should have jurisdiction over such offences.<sup>2</sup>

Oppenheim observes that the view which has the support of the bulk of practice is that in principle members of visiting forces are subject to the criminal jurisdiction of local courts, and that any derogations from that principle require specific agreement of the local State by treaty or otherwise.<sup>3</sup>

The above view is strengthened by the provisions of the Anglo-Egyptian Convention of the 26th August, 1936, article 5 of which provided:

"Without prejudice to the fact that British camps are Egyptian territory, the said camps shall be inviolable and shall be subject to the exclusive control and authority of the Appropriate British Authority."

Oppenheim: International Law, Vol. I, pp. 847-48
 G. P. Barton: Foreign Armed Forces: Qualified Jurisdictional Immunity. The British Year book of International Law, 1954, pp. 341, 346.

3. Opperheim International Law, 8th Ed., Vol. I, p. 849.

The Agreement of June 19, 1951, between the Parties to the North Atlantic Treaty gave recognition to the general jurisdiction of the receiving State, except where the armed forces were directed solely against the property or security of that state or solely against the person or property of another member of its forces or which arose out of any act or omission done in performance of a legal duty in which cases the sending State was to exercise its jurisdiction.

To the same effect are the observations of Col. Archibald King in his brilliant article1: "The general principle is abundantly established by reason, authority, and precedent, that the personnel of the armed forces of Nation A, in Nation B by the latter's invitation or consent, are subject to the exclusive jurisdiction of their own courts-martial and exempt from that of the courts of B, unless such exemptions be waived."

This is in consonance with the view expressed in Chung Chi Cheung v. The King2 that sailors committing offences on board foreign warships, whether within territorial waters or not, are immune from the jurisdiction of local courts unless there be a waiver of jurisdiction on the part of the State to whom the warship belongs.

Offences committed while on duty.—As regards offences committed while the accused is on duty, Lawrence is of opinion that in the absence of special agreement the visiting troops would not be amenable to the local law, but would be under the jurisdiction and control of their own commanders, as long as they remained within their own lines or were away on duty, but not otherwise.3

It nust be clearly understood that immunity extends, according to the consensus of opinion of the courts, for acts arising out of their official duties and not for private acts. In Triandafilou v. Ministere Public4 the accused, a memher of the Greek naval forces in Egypt, assaulted a policeman while oshore in order to purchase provisions for the warship. He involved himself in a fracas, and the only question that arose in the case was whether Triandafilou, the accused, was or was not on a mission at the time the offence was committed. It was held by the Court of Cassation on appeal that the certificate of the commanding officer that on the day on which the offences was committed Triandafilou had left his ship to perform his duties ashore, was conclusive. The only reason why the members of the crew of a warship enjoyed any immunity ashore was that they were carrying out orders relative to the needs of the ship. In effect it was a case of extending the immunity of the ship itself outside the ship for the purpose of meeting its needs. This was the basis of the principle which withdrew these members of the crew from the local jurisdiction when they were on a mission (service commande.) Duty was not to be interpreted with regard to the actions of the person who received the order but rather with regard to him who gave the order and who was concerned with its execution.

The same principle was accepted in another case, Ministere Public v. Scordalos5, and the accused was held immune from criminal proceedings instituted in the courts of Egypt .on the declaration of the accused's superior officer that the accused was on mission so long as he was attached to the Bureau of Naval Intelligence.

Jurisdiction over Friendly Foreign Armed Forces, 36 A. J. I L. (1942) 567.
 (1939) A. C. 160.
 Lawerence: The Principles of International Law, 7th Ed., p. 223.

Annual Digest, 1919-4? (Supplementary Volume, Case No. 86; A. J. 39 (1945) p. 345. J. T. M. 19-20 May, 1944, 3308, p. 2.

In the case of McLeod, the accused was a member of a British armed force. He was sent by the Canadian Government in 1837 into the territory of the United States for the purpose of capturing the Caroline, a vessel equipped for crossing into Canadian territory with a view to giving aid to the Canadian insurgents. He was arrested in New York and was indicted for murdering a citizen of the United States on the occasion of the capture of the Caroline. The British Government demanded his release, and Mr. Webster, the Secretary for Foreign Affairs of the United States, had to concede the immunity of McLeod from American tribunals.

As a result of a series of decisions, Barton in his illuminating article concludes that there is no basis for a supposed rule of international law recognizing immunity from prosecution in local courts for members of a visiting force who commit offences either within the limits of their quarters, or while on duty, or against fellow servicemen or their property. The first two of these circumstances, he observes, have the support of textbook writers over a period of a hundred years or more. There is now in existence a multilateral jurisdictional agreement which may be expected to record the highest common factor of agreement and which passes over in silence the traditional concept of conditional immunity in favour of a radically new system of priorities in the exercise of jurisdiction for certain offences. This modern departure from the theories of writers provides some evidence that those theories did not conform to international law as fully as their emphatic language seemed to indicate.

It might be of interest to note here that during the Second World War the armed forces of several allied countries were stationed in Great Britain, and the Allied Forces Act of 1940 enpowered the Military Tribunals of Allied Governments to exercise jurisdiction in regard to offences committed by members of their armed forces concerning discipline and internal administration. The sentences passed by these tribunals were enforced by the British authorities.

As noticed earlier, in accordance with an agreement signed in June, 1951, by the North Atlantic Powers under the aegis of the North Atlantic Preaty Organization, a large number of troops have been stationed in foreign countries and the sending and receiving States have been empowered to exercise concurrent jurisdiction over the members of a visiting force of a North Atlantic Power. But exclusive jurisdiction is to be exercised by each State in regard to offences punishable only by its laws. The sending State has also been conferred the primary right to exercise jurisdiction (in cases of concurrent jurisdiction) in regard to offences solely against the property or security of the sending State or against the person or property of the members of the force or offences arising out of any act or omission in performance of official duty. In civil matters the sending State cannot claim any immunity with regard to its forces unless the members of the visiting force act within the scope of their official duties.

<sup>2.</sup> The British Year Book of International I aw, 1954, pp. 341, 370.

## CHAPTER XIX

# JURISDICTION OVER PUBLIC AND PRIVATE VESSELS

What is a Public Vessel.—"A public vessel", of serves Pitt Cobbet, "is owned and commissioned by a Government of a sovereign State; or even, it seems by the Government of a semi-sovereign State, so long as the latter is recognised externally as a separate international person. In the category of public vessels are included not only ships of war lut also unarmed Government vessels, store ships and transport."

Proof of character.—The public character of a vessel is determined by the flag and the commission issued by the Government of the State to which she belongs. In case of doubt, as a matter of courte sy the word of the

commander evidences the character of the vessel.

Legal Position of Public Vessels on Open Sea and Foreign Territorial Waters.—According to Oppenheim it is a customary rule of the Law of Nations that men of war and other public vessels of any State are, whilst on the open sea as well as in foreign terrirorial waters, in every point considered as though they were floating parts of their home States.

Chief Justice Marshall considered the above proposition in the Schooler Exchange<sup>1</sup> and held that "a public armed ship constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing these objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and his dignity. It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exemptedly the consent of that power from its jurisdiction."

This matter again came up for consideration in Chung Chi Cheung v. The King,<sup>2</sup> and Lord Atkin held that a public ship in foreign waters is not treated as territory of her own nation. The domestric Courts, in accordance with the principles of International Law, accord to the ship and its crew certain immunities, some of which are well-settled, though others are in dispute. In this view the immunities do not depend upon an objective exterritoriality, but on implication of the domestic law. They are conditional and can in any case be waived by the nation to which the public ship belongs.

Lord Atkin disagreeing with the view of exterritoriality of a public ship quoted with approval the views of Sir Alexander Cockburn: "The rule which reason and good sense would, as it strikes me, prescribe, would be that as regards the discipline of a foreign ship, and offences committed on board as between members of her crew towards one another, matters should be left entirely to the law of the ship."

Finally Lord Atkin rejected the doctrine of exterritoriality expressed in the words of Oppenheim which regarded the ship, "as floating portion of the flag State, and laid down that the true view was that in accordance with the conventions of International Law, the territorial sovereign granted to foreign sovereigns and their envoys, and public ships and the naval forces carried by

 <sup>(1812) 7</sup> Cranch, 116.
 (1939) A. C. 160).

such ships certain immunities, some of which were well-settled and others uncertain.

Professor Brierly in rejecting the theory of exterritoriality observes thus: "The term 'exterritoriality' is commonly used to describe the status of a person or thing physically present in a State's territory, but wholly or partly withdrawn from that State's jurisdiction by a rule of International Law, but for many reasons it is an objectionable term. It introduces a fiction, for the person or thing is, in fact, within and not outside, the territory: it implies that jurisdiction and territory always coincide, whereas they do so only generally; and it is misleading because we are tempted to forget that it is only a metaphor, and to deduce untrue legal consequences from it as though it were a literal truth. At most, it means nothing more than that a person or thing has some immunity from the local jurisdiction; it does not help us to determine the only important question, namely, how far this immunity extends."

According to a resolution passed by the Institute of International Law in 1894 all ships, without distinction, enjoy the right of innocent passage through territorial waters subject to the rights of belligerents to regulate this passage. This, however, excluded vessels of war and vessels assimilated to them. The free passage of warships, according to another resolution passed at the Stockholm Conference of 1928, could be subjected to special rules by the territorial State. Similar provisions were adopted by the International Law Association at its Vienna Conference in 1926: "The ships of all countries, public as well as private, have the right to pass freely through territorial waters, but are subject to the regulations enacted by the State through whose territorial waters they pass, provided that such regulations do not infringe any of the provisions contained in this Convention."

In the Co-fu Channel Case<sup>1</sup> the International Court of Justice went to the length of holding that the right of innocent passage implied an obligation on the territorial State not to permit the use of its waters to the detriment of other States. The Court found Albania liable under International Law and bound to pay compensation to the United Kingdom for having failed to warm the British ships of the existence of minefields in its waters.

Cases of Collision.—As regards jurisdiction in cases of collision the case of the S. S. Lotus' is an authority on the subject. It was held by the Permanent Court of International Justice that following the collision on the high seas between the French steamship Lotus and the Turkish steamship Boz-Kourt and in consequence of the loss of the Boz-Kourt having involved the death of eight Turkish nationals, Turkey by instituting criminal proceedings in pursuance of Turkish law against Lt. Demons, officer of the watch on board the Lotus at the time of the collision, did not act in conflict with the principles of international Law. The Court held that the offence for which Lt. Demons was prosecuted was an act of negligence or imprudence, having its origin on board the Lotus, whilst its effects made themselves felt on board the Boz-Kourt and consequently each State was able to exercise jurisdiction in respect of the incident as a whole.

Public Armed Vessels.—In time of war the public vessels of a belligerent are invested with a right of visit and search over neutral private vessels, and with a consequent right of arrest and detention when there is reasonable ground for suspicion that the vessel is engaged in some enterprise against the safety of the State to which the public vessel belongs. In time of

I. I. C. J. Reports 1949 p. 4.

P. C. I. J (1927) Series A, No. 10.

peace the public armed vessel can arrest vessels of other States (i) in cases of piracy; (ii) when the vessel is engaged in an enterprise, against the safety of the State to which the public vessel belongs; (iii) in the right of hot pursuit; and (iv) where a right is conceded by treaty between the powers to which the vessels belong.

Immunities.—A public vessel, if not engaged in commerce, is not subject to the local law, nor is she liable for local dues, e. g., harbour or light dues, or to inspection by customs officers. She cannot be seized for debt or damage. Her officers and members of the crew while on board also enjoy the same immunities. At the same time it is expected of her to show due respect to the laws of the State in whose waters she happens to be. She must observe any quarantine regulations of the port and must not give asylum to fugitive criminals. She must not land armed forces without the consent of the territorial State. "The immunity of a public ship therefore means," observes Brierly, "not her total exemption from the local law, but her immunity from any kind of legal process or police action, and that if she violates that law the only proper method of redress is through diplomatic action."

State-owned commercial ships.—There is divergence of views whether States embarking on trade activities should be given immunity in respect of their commercial ships or not. On the one hand it is maintained that any action brought against a State-owned ship amounts to impleading a foreign State in an indirect way. On the other hand, it is equally strongly maintained that such State-owned commercial ships should not be given any kind of immunity as that will place the nationals of the State at a great disadvantage in the competitive field, inasmuch as a foreign State will be able to file a suit against the subject of a State, but the latter will not be able to do so against the State on account of immunity.

About half a century ago foreign governments seldom embarked in trade with ordinary ships, though they frequently owned vessels destined for public use, and in particular hospital vessels, supply ships and surveying or exploring vessels. Public ships of such nature enjoyed the privilege long possessed by warships. But the position of State-owned commercial ships is different. It is a development which has grown since the Great War. It is surely not consistent with sovereign dignity to compete with ordinary shippers and shipowners in the markets of the world, and if a sovereign does so he is not entitled to any immunity. It will be inconsistent to set up the immunity of a sovereign if, owing to the want of skill of captain and crew, serious damage is caused to the ship of another country. It will also be inconsistent to refuse to permit proceedings to enforce a right of salvage in respect of services rendered, perhaps at a great risk, by a vessel of another country. There is no justice or equality, or for that matter international comity will not be followed, in permitting a foreign government, while insisting on its own right of indemnity to bring actions in rem or in personam against another State's own nationals.

In spite of this, immunity is granted to State-owned commercial ships by Great Britain and the U. S. A., but the Italian courts have permitted proceedings, original and executive, against the State-owned commercial ships. According to the 1926-convention for the codification of certain rules concerning the immunities of government vessels, which was signed at Brussels, the State-owned commercial ships were to be placed on the same footing as the privately-owned ships.

What is a private vessel.—Private vessels, observes Pitt Cobbett, are vessels which, although owned by private persons, are yet, by virtue of their

title to the national character and their lawful use of the maritime flag of some State, deemed to belong to the State. Such vessels, even though outside the national territory are entitled to the protection of their State, and are also subject to its authority and jurisdiction.

Legal Position of Private Vessels on the High Seas.—A private vessel whilst on the high seas is subject to the sovereignty of the State to which she belongs and whose flag she is flying. The flag State has the right to exercise an administrative jurisdiction in respect of all matters occurring on board concerning its subjects or foreigners. It has also jurisdiction with regard to crimes committed on board the ship. It has similar jurisdiction in civil cases both with regard to its subjects and foreigners. It is further entitled to protect its nationals on board the vessel unless such vessel is guilty of violating the laws of another State within its waters.

Oppenheim observes that private vessels are considered as though they were floating portions of the flag State only in so far as they remain whilst on the open sea in principle under the exclusive jurisdiction and protection of the flag State. Pitt Cobbett also shares the same view when he observes that private vessels on the high seas are regarded as a part of the country to which they belong.

The jurisdiction of the flag State in respect of its private vessels is, however, subject to the following exceptions recognised under the customary international Law.

- 1. A belligerent man-of-war has an inalienable right to visit and search a merchant ship and eventually to seize if she resists, if engaged in an illicit act or when the character of the ship cannot be determined on account of the absence of papers.
- 2. In time of war a neutral merchantman attempting to break the rules of contraband or a blockade is liable to capture.
- Men-of-war of all nations have a right to encounter on the high seas suspicious merchant vessels in order to find out if they are pirates.
- 4. Men-of-war of a littoral State can pursue a foreign vessel for an infringement of the laws and regulations of a coastal State. This right of pursuit can be exercised when the foreign vessel is within the inland waters or territorial sea of the State and may be continued outside the territorial sea so long as the pursuit has not been interrupted. The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State.
  - 5. Men-of-war of every State have the right to seize and bring to their own port for punishment any vessel sailing under the flag of their State.
  - 6. By common maritime usage a vessel coming into collision with another vessel on the high seas and subsequently putting into a foreign port is liable to be proceeded against in the local courts, even though both ships be foreign and involve only foreigners in the collision. "It is not the locality of the tort but the presence of the parties or the res before the tribunal which gives the court jurisdiction."
  - 7. A similar exception to the exclusive jurisdiction of the State of the flag is to be found in cases of salvage. [The Johann Friedrich, The Leon and The Two Friends].

<sup>1. (1888) 1</sup> W. Rob. 35.

<sup>2. 6</sup> P. D. 148.

<sup>3. 1</sup> C. Rob. 271.

Jurisdiction over foreign private vessels in national waters.—
Article 2 of the Geneva Statute on the International Regime of Maritime
Ports (1923) provided that subject to reciprocity and a unilateral right of
suspension in case of non-performance by any other party every contracting
State undertook to grant the vessels of every other contracting State equality
of treatment with its own vessels, or those of any other State whatsoever, in
the maritime ports situated under its sovereignty or authority, as regards
freedom of access to the port, the use of the port, and the full enjoyment of
the benefit as regards navigation and commercial operation which it affords
to vessels, their cargoes and passengers.

A State's control o er foreign merchant vessels in its territorial waters is subject to their right of innocent passage. According to Vattel "a nation cannot refuse access to non-suspected vessels, for innocent purposes, without infringing its duty." Hall maintains that the interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all States.

A foreign private vessel voluntarily entering the territorial limits of another State subjects herself to the jurisdiction of the latter. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exercise of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely on its discretion: Gunard v. Mellon.

As regards criminal jurisdiction both the American and British Courts decline jurisdiction when their interests are not affected. Ordinarily jurisdiction over foreign vessels is declined unless the crime affects the tranquillity of the port, persons who are strangers to the vessels are involved or where the vessel seeks the assistance of the local authorities.

There are two views about jurisdiction in criminal matters. Great Britain asserts the complete subjection of the ship to local jurisdiction. The French view claims that the foreign ships in French waters are subject to French jurisdiction in matters touching the interests of the State, in matters of police, and for offences committed, even on board by members of the crew against strangers; but that in matters of internal discipline, including offences by one member of the crew against another, the local authorities ought not to interfere, unless either their assistance was invoked or the peace of the port compromised.

A merchant vessel must not afford asylum to a fugitive from justice, and such a fugitive may even be removed from the ship.

As regards civil jurisdiction on general principles of comity, admirally courts generally do not interfere between the parties, unless there is a special reason for doing so. Where, however, special circumstances exist, such as where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, the Courts, in the absence of treaty stipulations, entertain jurisdiction: The Belgenland.<sup>2</sup> There is, therefore, a consensus of opinion that a private ship in a foreign port is subject to the local jurisdiction in civil matters.

<sup>1. 262</sup> U.S. 10 .

<sup>2. 1.4</sup> U.S. 355.

### CHAPTER XX

#### PIRACY

A pirate is an enemy of the whole human race, hostis humani generis. He is outlawed by the law of all nations, his act being one directed against the whole body of civilized States.

Definition .- Molley in his book "A Treatise of Affairs Maritime and of Commerce" defines a pirate as a "sea thief or hostis humani generis (the enemy of the whole human race) who to enrich himself either by surprize or open face sets upon merchants or other traders by seas." He clearly does not regard piracy as necessarily involving successful robbery or as being inconsistent with an unsuccessful attempt. Hall states: "The various acts which are recognized or alleged to be piratical may be classed as follows: robbery or attempt at robbery of a vessel, by force or intimidation, either by way of attack from without, or by way of revolt of the crew and conversion of the vessel and cargo to their own use." It was observed by Viscount Sankey, L. C. in answer to the question referred to by his Majesty in Council, In re Piracy Jure Gentium1 that actual robbery is not an essential element in the crime of piracy jure gentium (piracy under International Law). A frustrated attempt to commit piratical robbery is equally piracy jure gentium. In that case the Privy Council refrained from giving a definition of piracy but favoured the definition of Kenny: "Piracy is an armed violence at sea which is not a lawful act of war."

Essential Ingredients of Piracy.—Under International Law piracy consists in sailing the seas for private ends without authorisation from the Government of any State with the object of committing depredations upon property or acts of violence against persons. It constitutes a crime against the security of commerce on the high seas, where alone it can be committed.<sup>2</sup>

Wheaton defines piracy as being the offence of "depredating on the seas, without being authorised by any foreign State, or with commissions from different sovereigns at war with each other."

In Moore's "Digest of International Law" a pirate is defined as "one who without legal authority from any State, attacks a ship with intention to appropriate what belongs to it. The pirate is a sea brigand. He has no right to any flag and is justiciable by all."

In the United States v. Smith<sup>4</sup> Story, J. observed: "Whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery or forcible depredations upon the sea, animo furandi, is piracy."

In the American case The Ambrose Light<sup>5</sup> it was observed by the Federal Court that an armed ship must have authority of a State behind it, and if it has not got such an authority it is a pirate even though no act of robbery has been committed by it.

1. (1934) A. C., 5 6.

25 Fed. Rep. 408.

2. c/o M. Matsuda—Report to the League of Nations Committee of Experts for the Progressive Codification of International Law.

3. (1906) Vol. 2, p. 953. 4. (1820) 5 Wheat. 153, 161. It is clear from the above that the essential ingredients of an act of piracy are:

- (1) It is an act performed by a person sailing the high seas.
- (2) Such an act is without the authority or commission of any State.
- (3) Actual robbery is not an essential element in the crime of piracy jure gentium; a frustrated attempt to commit robbery is equally piracy jure gentium.
- (4) Such act of robbery is committed by a private vessel against another vessel or by the mutinous crew against their own vessel.
- (5) The essence of piracy consists in the pursuit of private, as contrasted with public, ends.

A public armed vessel has a right to search another vessel if there is a reasonable suspicion of piracy or if she suspects that the vessel is engaged in activities against the safety of the State to which the public vessel belongs. Where pirates are caught at sea, after committing robbery on land, the captor's State has jurisdiction over them. It was held by Dr. Lushington in The Magellan Pirates 1 that the pirates can also be followed after their initial act of piracy on the high seas and taken on shore.

Piratical acts authorised by a Government.—Even an independent State may be guilty of piratical acts: The Magellan Pirates<sup>1</sup>, Professor Hyde maintains that "national authorisation of the commission of piratical acts would not free pirates from their internationally illegal aspects". It was resolved at the Washington Conference (1922) that any person violating the rules of International Law, even while acting under superior orders could be proceeded against in the Courts of any state "as for acts of piracy".

Right of Visit and Seizure of Piratical Ships.—All warships are entitled to visit a vessel deemed to be piratical for the purpose of ascertaining her true character and to chase, capture and bring her into the courts of their country for trial. A pirate loses the protection of the flag.

Ownership of property in piracy.—A robbery by piracy does not deprive the rightful owner of his property which has to be restored to him when recaptured. Under S. 5 of the Piracy Act of 1850 all ships and goods taken possession of from pirates and proved to have belonged to any of Her Majesty's subjects or from the subjects of any foreign power shall be restored by decree of the Admiralty Court to the former owner.

Case Law.—An insurgent warship engaging in hostilities after the non-existence of the Government to which the ship Lelonged is guilty of an act of piracy. This happened with the Confederate cruiser Shenandoah which, during the American Civil War, continued her belligerent operations off Cape Horn even after the capitulation of the Confederate Government. But it was found on the arrival of the Shenandoah at Liverpool that she was ignorant at the time of the surrender of the Confederates. The British authorities accordingly released the captain and crew and restored the cruiser to the United States Government as not being guilty of piracy.

2. Vol 1, p. 411.

I. (1853) 1 Spink's E. & A. 81.

Piracy according to Municipal Law.—Piracy according to International Law must not be confused with piracy according to municipal laws of States. A State can frame law treating as piratical certain criminal acts of lesser gravity than those embodied in the term piracy by International Law. The natural consequence is that there is a restriction on the jurisdiction of a State if the piratical act is only punishable by municipal law for in that case the State cannot enforce its municipal law on the open sea against a foreigner; it can, however, punish its nationals even though their act may not fall within the ambit of piracy by International Law for they being nationals are subject to the municipal law of the State. In the case of piracy by International Law every State has jurisdiction to punish persons guilty of such acts for it is an offence against the whole body of civilized States.

According to the British Year Book of International Law, 1938, "the municipal law of different countries may and often does assimilate to piracy jure gentium other acts which are not covered by it and may call them piracy (for instance, the act of a crew in revolt against owner or master in seizing and making off with the ship), but they cannot, in respect of such acts committed by foreigners on the high seas, claim the exceptional jurisdiction which applies to piracy jure gentium. Further, two or more States may by treaty agree to add other acts to the categories of violence at sea covered by piracy jure gentium and may agree to exceptional transport provisions with regard to such acts (as for instance, slave tradings, or arms running), but such treaties can only govern the relations of the parties to them unless and until by wide acceptance they become part of the general law of nations. Moreover in practice the exceptional jurisdiction provisions in such treaties have always fallen short of the provisions applicable to piracy jure gentium".

The Washington Naval Conference of 1922 enlarged the scope of piracy in International Law by laying down that persons on surface vessels or sub marines violating the human rules of warfare were to be tried and punished for the offence of piracy. This provision was, however, never enforced.

Nyon Agreement.—During the Spanish Civil War (1936-39) the British-Government adopted a policy of non-intervention. A large number of merchant vessels were destroyed in the Mediterranean by German and Italian submarines, and to avert any catastrophe of war the British and French Governments convened a conference of the Mediterranean powers at Nyon in September 1937. As a result of the conference it was agreed between Great Britain, France, the Soviet Union, Turkey, Rumania, Bulgaria, Egypt and Yugoslavia that the patrolling warships of the signatory powers operating within the specified areas in the Mediterranean were authorised to counterattack and destroy submarines found engaged in attacking any merchant vessel not belonging to either of the conflicting parties. It was stated that the attacks by the submarines were acts of piracy. The supplementary agreement of September 17, 1937, extended the provisions applicable to surface vessels and aircraft.

It is to be noted that these attempts to enlarge the scope of piracy were exceptional measures and did not affect the fundamental law with regard to piracy.

# Air Piracy (Hijacking)

Aircraft hijacking defined.—'Aircraft hijacking' is a contemporary addition to the roster of international and national crimes, and the necessity for its control at the international and national levels is only beginning to be recognized by States.¹ It is unlawfully interfering with, seizing or otherwise wrongfully exercising control of an aircraft in flight by a person who is on board in order to change its itinerary. The offence of 'aircraft hijacking' essentially consists of taking or conversion to private use of an aircraft as a means of transportation and forcibly changing its flight plan to a different destination. Theft of the aircraft itself or robbery of passengers or crew has not normally been the practice of hijackers during the past two decades, although both acts have taken place on occasions.²

Incidence of Hijacking.—From January 1948 to the beginning of September 1969, 121 cases of completed hijackings were reported. Since May 1961 fiftyone aircraft of the United States registration were victims of hijacking operations and Cuba was the destination in fifty cases. During the period 1961 and 1969, sixtynine cases of hijacking took place. The cases of hijacking during the period 1948-50 may partly be traced to political turmoil in Czechoslovakia and China, and those during 1958-1962 to the consolidation of its authority by the Castro regime in Cuba. The hijacking or skyjacking game was earlier practised by the domiciled Cubans in Miami America) for personal reasons because they were not allowed to visit their native land, Cuba. Later on, it too's a turn for securing political gains.

Hijacking by Palestinian guerillas.—The subject of aircraft hijacking assumed great importance in September 1970 when Palestinian guerillas hijacked as many as four planes and destroyed three by blowing them up, including a Pan-American Jumbo jet, which they had hijacked to a desert airstrip in Jordan. The latest cases of hijacking were practised not for escaping from one country to another, but in furtherance of the "war of liberation", as the Marxist extremists among the Palestinian guerillas have termed it.

On May 31, 1972, a Japanese squad, hired by Arab guerillas, killed 26 persons and wounded 72 in the customs hall of the Lydda airport in Tel Aviv. The guerilla terror struck a second time within a year at Munich where the Olympiad 1972 was being held. On September 5, 1972, some Arab guerillas scaled the wall of the village and reached the quarters occupied by the Israeli sportsmen and rounded up 20 Israelis who were held as hostages. At the airport the Munich police opened fire on guerillas who in turn fired at the hostages killing nine of them. Three guerillas were killed in the action and three were captured by the German police.

The three Palestinians imprisoned in West Germany following their alleged dastardly participation in the Munich Olympic Games killings were however surrendered to the three Arab hijackers (Black September group) at the close of October 1972 when they skyjacked a West German Lufthansa plane to Zagreb and threatened to blow up the aircraft if the West German Government did not concede, and the West German Government submitted to the blackmail.

<sup>1.</sup> Alona E. Evans: Aircraft Hijacking, Its Cause and Cure, Vol 63, 1969 American Journal of International Law, p. 695.

Ibid., p. 696.
 Oppenheim: International Law, A Treatise, Vol. 1, p. 608.

On December 28, 1972, four Black September guerillas seized the Israeli Embassy in Bangkok, Thailand, and held six Israeli diplomats as hostages for 19 hours. They threatened to kill the hostages and blow up the embassy unless Israel freed 36 Palestinians held in its prisons. As usual, the government of Israel refused to bow down before these demands. However, the government of Thailand took prompt action. The embassy was immediately ringed and it was impressed upon the commandos that there would be no bargaining about the hostages. The Chief of Staff of the Thai army himself met the guerillas and argued with them. The Egyptian Ambassador in Thailand also joined him. The commandos, after much persuasion, agreed to refrain from carrying out their plan if they were given safe passage to Cairo. The Thai government consented and thus a great tragedy was averted.

Hijacking of Indian plan?.—On January 31, 1971, an Indian passenger plane was hijacked by two political fanatics to Lahore in Pakistan. On February 2, 1971, the skyjackers blew up the plane in full view of Pak. troops and aviation personnel. Suprisingly, instead of being treated as the criminals, the skyjackers were given asylum by the Government of Pakistan.

Air Piracy.—Air Piracy is a new development not envisaged earlier. Piracy in its original and strict meaning is an unauthorised act of violence committed by a private vessel on the open sea against another vessel with intent to plunder (animo furandi).¹ Professor Oppenheim elaborates the definition of piracy by saying that it comprises every unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.

Piracy, in the classical sense or strict legal parlance is, therefore, robbery or forcible depredations upon the sea, animo furandi. It is not an act performed b. a hijacker in the sky. The essence of piracy also consists in

the pursuit of private, as opposed to public, ends.

International Air Law.—The rules of international civil aviation are enshrined in the various conventions adopted by nations from time to time. The Convention relating to the Regulation of Aerial Navigation, 1919, recognises that every nation has complete and exclusive sovereignty over air space above its territory and that each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States. The Convention on International Civil Aviation, 1944, provides that each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services, shall have the right, subject to the observance of the terms of the Convention, to make flights into or in transit non-step across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing.

Geneva Conventions on the High Seas, 1958.—In the 1958-Geneva Conventions on the High Seas reference is made to piracy by aircraft. Article 15 defines piracy to consist of any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or aircraft, and directed on the high seas against another ship or aircraft, or against persons or property on board such ship or aircraft. The emphasis here is on the piratical act being committed for private ends and directed on the high seas against another ship or aircraft. "This excludes from piracy jure gentium both acts solely inspired by political motives and acts

1. Oppenheim: International Law, A Treatise, Vol. 1, p. 608.

committed on board a ship or aircraft by the crew or passengers and directed against the ship or aircraft itself or persons or property on board." The exclusion of these acts from being considered criminal acts of piracy under international law does not in any way relieve the persons concerned of any criminal liability which may attach to them in respect of these acts under the

law of the flag state or of the state whose nationals thep may be.

In the case of Re Piracy Jure Gentium<sup>2</sup> the Judicial Committee of the Privy Council laid down that actual robbery is not an essential element in the crime of piracy jure gentium (piracy under International Law). A frustrated attempt to commit piratical robbery is equally piracy jure gentium. In view of the extended meaning of the term piracy' given by the Judicial Committee, the offence may be prompted by motives other than gain, e. g., revenge. The Geneva Conventions of 1958, however, did not adopt this extended meaning of piracy and definitely rejected it by confining the term piracy to any illegal act of violence, detention or any act of depredation, committed for private ends.

In view of the increased piratical acts on aircraft in 1961 the United States Congress amended the Federal Aviation Act of 1958 to provide for the offences of aircraft piracy by including interference with flight crew members or attendants by assault, intimidation or threat, and the carrying of concealed deadly or dangerous weapons on board an aircraft by unauthorised persons.

Perils of Air Piracy.—Close on the heels of Cuban and the Latin American adventurers, whose activities have been brought under control by Castro and the realisation by Latin American adventurers of the futility of the job, the activities of the Palestinian guerillas have made international flights almost perilous, adding a new dimension to foreign relations and the law and order situation in the air.

The United States of America and the United Kingdom referred the matter to the United Nations President Nixon made an appeal to all countries in the world to meet the challenge of air piracy immediately and effectively in the context of the hijackings by the Arab guerillas. The U. N. Secretary General U Thant set the tone of reaction by denouncing hijackings as savage and inhuman acts. Every responsible Arab leader now recognises-although they lauded guerillas in the beginning as patrists-that plane sky-jacking does not serve the Arab cause. Such tactics, on the other hand, have turned the rest of the international community actively hostile.

In December 1969 the General Assembly, while feeling deeply concerned over acts of unlawful interference with international civil aviation, called upon States to ensure that their respective national legislations provided effective legal measures against hijacking of civil aircraft in flight, urged them to ensure prosecution of hijackers and urged full support for the efforts of the International Civil Aviation Organization to prepare and implement a convention to make unlawful seizure of civil aircraft a punishable offence.<sup>3</sup>

Tokyo Convention —The Tokyo Convention on offences and certain other acts committed on board Aircraft, which was signed at Tokyo on September 14, 1963, under the auspices of the I. C. A. O. and which came into force on December 4, 1969, forbids unlawful seizure of civil aircraft in flight and charges the contracting States with the duty of restoring such aircraft and cargo to the rightful owners and facilitating resumption of the interrupted

J. L. Brierly: The Law of Nations, Sixth Edition, p. 313.
 1934 A. C. 586.

<sup>1.</sup> The resolution was ado, ted by the United Nations General Assembly on December 12, 1969, by 77 votes in favour, 2 against with 17 abstentions.

flight. (Art. 11). This provision does not prescribe adequate punitive measures, nor has the offence been made a crime under international law. The main emphasis is upon restoration of property and resumption of flight. Articles 13 and 16 no doubt provide that the offender may be taken into custody by any contracting State and held for criminal proceedings or for extradition, but neither action is mandatory.

A sub-committee of the Legal Committee of International Civil Aviation Organization discussed the question of drafting of an international agreement designed to facilitate apprehension and prosecution of offenders and came to the conclusion that there should be a protocol to the Tokyo Convention or an independent convention to which non-signatories to the Tokyo Convention could also join which may provide for an international agreement relating to extradition and prosecution. The draft does not apply to aircraft on the ground, military or other public aircraft and flights wholly within the territory of the state of the aircraft, for the obvious reason that the state of registration and the state of first landing have jurisdiction to prosecute an offender.

As regards extradition, the draft provides that the offence shall be deemed to be included as an extradition offence in any extradition treaty existing or to be concluded between the various contracting States.

The draft does not e wisage any reference to political offence. And one of the necessary conditions for extradition generally inserted in extradition treaties in compliance whereof the criminals are surrendered by one State to another through the diplomatic channel is that a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character.

The International Conference on Air Law convened at The Hague under the auspices of the I. C. A. O. from December 1 to 16, 1970, adopted the Convention for the Suppression of Unlawful Seizure of Aircraft.

A diplomatic conference convened by I. C. A. O. to consider the draft convention on acts of unlawful interference against international civil aviation met in Montreal in September 1971 and adopted and opened for signature the Convention for the Suppression of Unlawful Acts against the safety of Civil Aviation.

U. N. resolution on skyjacking.—The U. N. General Assembly adopted a resolution on November 25, 1970, which condemned all acts of aerial hijacking and called upon States to take all appropriate measures to deter, prevent or suppress acts within their jurisdiction at every stage of the execution of these actions and to provide for the prosecution and punishment of those who perpetrate such acts in a manner commensurate with the gravity of those crimes.

Hague Convention, 1970.—The International Conference on Air Law convened at The Hague under the auspices of the I. C. A. O. from December 1 to 16, 1970, adopted the Convention for the Suppression of Unlawful Seizure of Aircraft. In order to give effect to the Convention Great Britain passed the Hijacking Act, 1971.

Montreal Convention, 1971.—A diplomatic conference convened by I. C. A. O. to consider the draft convention on acts of unlawful interference against international civil aviation met in Montreal in September 1971 and adopted and opened for signature the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

The Tokyo Convention did not attempt to define specific offences, as this would have involved the preparation of an international criminal code covering a wide range of offences. The Hague Convention only defined the offence of unlawful seizure of aircraft. But the Montreal Convention, 1971, adopted the enumerative approach and described a number of penal offences within the framework of a multilateral convention. Article 1 of the Convention extends the concept of universal jurisdiction to all offences or attempts at hijacking. The Montreal Convention embodies The Hague Convention provisions on the taking of the alleged offender into custody, joint air transport operating organizations or international operating agencies, etc. There is provision for the settlement of disputes, subject to a reservation concerning this provision. The Montreal Convention has broken new ground and goes beyond mere codification—in providing for international legal action to be taken by states in respect of many acts which, however reprehensible they may be, previously were not considered eligible for treatment in an international convention on criminal matters.

Remedial Measures.—Air piracy should be treated a heinous crime having no frontiers. Air hijackers should not receive any aid and assistance from any State whatsoever. They should be treated as air brigands and no national sympathy for the commission of these piratical acts would free them from their international illegal aspects. On the face of it the act of hijacking constitutes a theft in that it involves the taking of personal property without consent in such a manner as to create an unreasonable risk of permanent loss. It is essentially an international criminal offence, and there should be concerted effort on the part of States to realise its gravity and to adopt punitive legislation relative to the offence and at the same time agreeing to the extradition of hijackers.

## CHAPTER XXI

## JURISDICTION OVER ALIENS

Admission of Aliens.—There is a difference of opinion with regard to the right of a State to regulate the admission of the aliens into its territory. The Courts of the United States have held that every nation has an inherent right by virtue of its sovereignty to forbid the entrance of foreigners within its dominions, or to admit them upon conditions: Nishimura Ekiu v. United States.<sup>2</sup> The extreme view that a State is bound to admit all aliens has never found favour with the States in general. In practice, however, due to intercourse and interdependence of States every State makes its own laws to regulate the admission of aliens in its territory. A State may refuse admission of aliens if they are likely to compete with its nationals. In view of these considerations immigration laws are found on the statute book of different countries.

According to Mr. Justice Gray, it is an accepted maxim of International Law that every sovereign nation has the power, as inherent in sovereignty and essential to preservation, to forbid the entrance of foreigners within its dominion or to admit them only in such cases and upon such conditions as it may seem fit to prescribe. According to him, it has also the right to exclude all aliens or any class of aliens absolutely or upon certain conditions, in war or in peace. The reception of the aliens, according to Oppenheim, is a matter of discretion and every State is by reason of its territorial supremacy competent to exclude aliens from the whole or any part of its territory.

2. 142 U S. 651.

<sup>1.</sup> American Fire and Casualty Co. v. Sunny South Aircraft Service, Inc. 140 So. 2d 78, 80 (1962).

The Right of Asylum.—A competence to grant asylum derives directly from the territorial sovereignty of States. It is generally recognised that, in the absence of an extradition treaty with the requesting State, the surrender of a foreign criminal who has taken refuge within its territory cannot be demanded. The so-called right of asylum is not a right possessed by the alien to demand that the receiving State must grant protection and asylum. Article 14 of the Universal Declaration of Human Rights lays down that "everyone has the right to seek and to enjoy in other countries asylum from persecution." That article, however, does not confer a right to receive asylum; it only enables him to seek and, if granted, enjoy asylum from persecution. Moreover the Declaration is also not a legally binding instrument.

Expulsion of Aliens.—With regard to expulsion of aliens, it is justified with respect to those aliens who conspire against the safety of the State in which they live. An alien, however, has no legal claim to residence in another State and the latter may send him out of the country. In spite of this, wholesale expulsion of aliens is never viewed with favour and leads to serious conflict, for no State can, with any measure of propriety, abuse the right.

An alien expelled without any cause in time of peace entails protest by the home-State through diplomatic means. In time of war, however, every State is entitled to expel enemy aliens. Even in time of peace aliens are not expelled for political reasons and when they are so expelled they are not sent to the country where their lives may be in danger on account of their political views. The Australian law provides that where an alien has lived in the country for three years or more, he is not liable for expulsion even though convicted for a criminal offence.

Vagabond, destitute or criminal aliens, entering a State without permission are generally arrested and reconducted to the home State.

Aliens subject to territorial supremacy.—When an alien enters the territory of a State he takes upon himself the consequences of the State laws in the same way as the citizens of that State. If he takes up a permanent residence in the State he is not exempt from taxes and other burdens that might be imposed on him by the laws of that country. It is the duty of the foreign State to offer a fair trial to an alien and also to protect him against assault on his person and property. He cannot be forced to do military service without his native country's consent. On the other hand, the home State may recall its citizens from any corner of the earth for the purpose of rendering military service. An alien does not altogether lose right to protection from his native country, but such invocation may not always sound reasonable and proper.

Treatment of Aliens.—Ordinarily foreigners are not entitled to a greater degree of protection or better guarantees of justice than are afforded to State's own citizens or subjects.¹ In other words, the duty of a State towards aliens within its jurisdiction is the same treatment and protection as are accorded to its own citizens. In the Neer Case² the Mexican Claims Commission observed in 1926 that the propriety of governmental acts should be put to the test of international standards, and that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of an intelligent law, or from the fact that the laws of the country

<sup>1.</sup> Amos S. Hershy: The Essentials of International Public Law and Organization, p. 254.

<sup>2.</sup> Opinions of Commissioners, Neer's Case. p. 73.

do not empower the authorities to measure up to international standards, is immaterial.

It will thus appear that a State can discriminate between citizens and aliens provided the treatment meted out to the latter does not fall below the accepted international standards. It was observed by the Commissioner in the case of U.S. A. (Henry Roberts) v. United Mexican States that although the facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint, yet such equality is not ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.

Aliens and the Protection of their Home State.—When a State admits an alien it must observe a certain standard of decent treatment towards him. His own State can claim reparation for any injury caused to him by resorting to diplomatic action or international judicial proceedings on his behalf. This right of the State, according to the Permanent Court, is necessarily limited to the intervention on behalf of its own nationals because, in the absence of special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of International Law must be envisaged.

Professor Brierly sees a certain artificiality in this way of looking at the question. In practice the theory that whenever a national is injured in a foreign State, his State as a whole is necessarily injured too is not consistently adhered to. In general, he observes, a person who voluntarily enters the territory of a State not his own must accept the institutions of that State as he finds them. He is not entitled to demand equality of treatment in all respects the political rights of a citizen. The expression "a certain standard of decent treatment" is a vague term. It should be a reasonable standard, and certainly toward a foreigner by reference to the fact that its own 'citizens are no better off than he."2

Thus a State can exclude aliens from holding real property, exclude them from certain professions and trade or compel them to register their names for the purpose of keeping them under control.

Every country claims the right to the allegiance of its subjects wherever they may be and in return guarantees them the right of diplomatic protection when abroad. It is therefore the privilege and the anxiety of every civilized nation to keep vigilant watch over its subjects abroad and to ensure for them, administered along lines of what is called, broadly for want of a better term, attural justice. A foreign State has a very direct interest in what is done to upon governments in this country to deprive foreigners of their liberty cannot but be a matter that will bring the Indian Union into relation with foreign ordinary courts of the land.<sup>3</sup>

Panevezys: Saldutiskis Railway Case, Series 1/B 76. p. 16.
 Svarlien: Introduction to the Law of Nations, p. 138.

<sup>3.</sup> Hans Muller of Nuremberg v. Superintendent, Presidency Jail, Calcutta. \. I. R. 1955

Position of Resident Aliens.—A resident alien can be required to pay rates and taxes if his residence in a foreign State is long. In case of necessity he can even be required to serve in the local police and local fire brigade with a view to maintaining law and order. During the Second World War most of the belligerent States compelled the resident aliens to perform civil service connected with the war effort. They cannot, however, be required to serve in the army or navy without the consent of the State to which they belong.

Certain privileges were granted to aliens as a result of certin treaties known as Capitulations entered into between some of the Asian and African countries and European countries. These treaties enabled the aliens not to be tried by the courts of the Asian or African States but by their own courts. Such treaties reminiscent of colonial days came to an end with the independence of Eastern States and growing consciousness of their right of self-determination. Japan ended the ex-territorial jurisdiction in 1899, Turkey in 1914 and 1923, Siam in 1927, Persia in 1928 and China in 1943. The U. S.-Japan Security Pact of 1952, however, provides for the United States Service Courts in Japan to retain exclusive jurisdiction over United States personnel and their dependants.

Right to Tax Aliens.—It is accepted on all hands as a principle of International Law that a State admitting an alien has, in consonance with its sovereignty, the right to tax him. In the George II. Gook case the United States Mexican Claims Commission observed that "the right of the State to levy taxes constitutes an inherent part of its sovereignty; it is a function necessary to its very existence and it has often been alleged, not only in Mexico, but in the United States and other countries, that legislatures, whether of States or of the Federation, cannot legally create exemptions which restrict the free exercise of the sovereign power of the State in this regard."

Jurisdiction Over Aliens—In the Cutting case<sup>1</sup> the Mexican Courts exercised criminal jurisdiction over an American citizen for the publication of a libellous article in Texas against a Mexican citizen. On his arrest Cutting appealed to the United States consul for protection alleging that he had been cast into jail for an alleged offence committed in Texas. In spite of representations made by the Government of the United States, the Courts of Mexico sustained their jurisdiction. It was observed that as acts consummated on the territory of the Canton of Bravos, State of Chihuahua, it was incumbent on the Judge to pass upon them conformably to the laws in force in the said State, especially in view of the fact that the accused resided in that town, where he had his domicile for more than two years.

In the Chinese Exclusion cas: Mr. Justice Field observed that the Government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power...... The power of exclusion of foreigners being an incident of sovereignty belonging to the Government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the Government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

1. Moore: Report on Extraterritorial Crime (1887), p. 9.

<sup>2.</sup> Chae Chan Ping v. United States (1), S. Supreme Court. 130 U. S. 581).

The Calvo Clause.—The last part of the nineteenth century and the early twentieth witnessed disturbed political conditions in the newer States of Latin America, resulting in occasional resort to armed intervention to enforce demands for redress. The foreigners did not resort to local remedies on account of primitive and unstable Governments, insufficient confidence in local standards of justice. The writings of the celebrated Argentine jurist, Carlos Calvo, provided a way out to Latin American States to pin down the foreigners to local remedies alone and thus restrain diplomatic interposition. The Calvo Clause limits or excludes the appeal of a foreigner or a foreign company to their home State in matters which are the subject of a contract with another State. The insertion of this clause in a contract prevents the foreign national from claiming with regard to the interests and the business connected with the contract any other rights or means to enforce the same than those granted by the foreign Government. In other words, the foreign national by agreeing to this clause renounces any claim upon his home State for his protection in respect of the contract.

The Calvo clause, according to Hackworth, lays down that equal rights may be granted to foreigners as to citizens, provided the foreigners agree before the Secretariat of Foreign Relations to consider themselves as nationals in respect to such property, and accordingly not to invoke the protection of their Government in matters relating thereto; under penalty in case of noncompliance, of forfeiture to the nation of property so acquired.

The Calvo Clause has been objected to on the ground that the individual who enters into the contract cannot waive a right which does not belong to him but to his government. It was observed by the U.S. Mexican Claims Commission in the North American Dredging Co. of Texas v. Mexico that although an alien may lawfully subscribe to the contract containing such a clause, he cannot deprive the Government of his nation of its undoubted right of applying international remedies to violations of International Law committed to his damage. Such government frequently has a larger interest in maintaining the principles of International Law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen cannot by contract tie in this respect the hands of his government.

"The Calvo clause", observes Schwarzenberger, "reasonably interpreted, may fulfil a highly, beneficial function, if its purpose is to prevent abuses of the right to protection, not to destroy the right itself-abuses which are intolerable for any self-respecting nation and are prolific breeders of international friction." Oppenheim is also of the view that while such clauses "may often have the legal effect of ousting the jurisdiction of an international tribunal until the remedies of the local courts have been exhausted, nevertheless the weight of authority is against the validity of so much of a 'Calvo clause' as purports to make an individual renounce the right which International Law confers, not upon him but upon his home State, of protecting him against treatment which contravenes the rules of International Law." Starke also shares the same view when he observes that in so far as the Calvo clause attempts to waive in general the sovereign right of a State to protect its citizens, it is to that extent void and that this clause is ineffective to bar the right of States to protect their nationals abroad, or to release States from their duty to protect foreigners on their territory.2

International Law, Vol. I, 8 h Ed. p. 345.

<sup>2.</sup> An Introduction to International Law, 7t 1 E1., pp. 100-301.

## CHAPTER XXII

# JURISDICTION OF MUNICIPAL COURTS IN SEIZURES EFFECTED IN CONTRAVENTION OF INTERNATIONAL LAW

Introduction.—We have studied in an earlier chapter that within the British Empire, according to the well-established rule, the making of a treaty is an executive act and for the performance of its obligations there must be legislative enactment if they entail alterations of the existing domestic law. In other countries, too, treaties require a process of transformation or incorporation into the domestic law in so far as legislative enactment is necessary for the appropriation by the national legislatures. A treaty duly signed and ratified automatically becomes part of the law of the land, and its appropriation by the national legislature imposes an international obligation upon it to pass the required Act.

The question arises whether municipal courts would exercise jurisdiction over persons and things brought before them in violation of the provisions of International Law. The question may be studied from three different angles, viz; seizures of individuals in the territory of another State in violation of extradition treaty, seizures of vess ls in the territorial waters of another State and seizures of vessels on the high seas in circumstances unwarranted by customary International Law or treaty.

Unlawful Seizures of Fugitives.—As regards unlawful seizures of fugitives, it was held by the Permanent Court of Arbitration, in the case of France v. Great Britain¹ commonly known as Savarker's case, that although it was admitted that an irregularity had been committed by the arrest of Savarkar and by his being handed over by the French police to the British police in mistaken execution of their duty, there was no rule of International Law imposing in such circumstances any obligation on the power which had in its custody a prisoner to restore him because a mistake was committed by the foreign agent who delivered up to that power.

Similarly, in the case of United States v. Insul<sup>2</sup> it was laid down that one charged with crime could not escape prosecution under the indictment by showing some irregularity, or even an unlawful kiduapping, by officers of the government which resulted in placing him within the jurisdiction of the court where the indictment against him was pending.

The same view was expressed in the case of Kutz v. Officer Commanding the Polish Military Prison Jerusalem<sup>3</sup> that, provided the Court Martial was properly constituted, and provided that the accused who was before it was subject to its jurisdiction, the circumstances in which he was arrested and arrived before the Court were not relevant to the question of the jurisdiction of the Court.

It is clear from the above decisions that municipal courts are reluctant to inquire into the legality or otherwise of acts of a foreign agent in arresting the

1. (1911) No IX.

Annual Digest, (1933-34) Case No 75.
 Annual Digest, (1943-45) Case No 45

fugitive, on the ground that the illegality, if any, consists in a violation of the sovereignty of an independent nation, and if that nation complains, it is a matter which concerns the political relations of the two countries, and in that aspect is a subject not within the constitutional powers of the municipal

The position is, however, different where extradition takes place in pursuance of treaty obligations. An extradition treaty generally contains a clause that a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character. Similarly there is the provision that the fugitive demanded shall not be liable to be tried for any offence committed prior to his surrender other than the specified offence mentioned in the request for his extradition until he has been liberated and has had an opportunity of leaving the country. In the case of United States v. Rauscher<sup>2</sup> the Supreme Court of the United States quashed the conviction of the fugitive who had been surrendered by Great Britain to U. S. A. upon a charge of murder by holding that unless otherwise provided for by treaty the prisoner could only be charged with the offence for which he was extradited unless he was given a reasonable time to return to the country which surrendered him

It this connection the decision of the Italian Court of Cassation in the case of Oberbichler3 is important. The fugitive there had been extradited to Italy on the condition that the death penalty shall not be imposed. The Court, although admitting that italy had undertaken an international obligation, nevertheless did not give effect to that condition observing that no limitation upon the application of the rule of law, even if derived from international relationships, can be taken into consideration by the judge unless it has been transmuted into a rule of municipal law.

The attitude of courts noted above to try offenders found within the jurisdiction of their countries in spite of they being brought within their jurisdiction in violation of the established rules of International Law is clearly not in consonance with the requirements of International Law and with the principles of the domestic law. In order to bring uniformity in the law-both international and municipal-it is certainly desirable that this be enunciated in clear terms by means of codification of International Law.

Seizures of Vessels in foreign territorial waters in violation of International Law.—As regards seizures of vessels in foreign territorial waters in violation of International Law, municipal courts ought not to exercise their jurisdiction with a view to legalising the seizures. It was held in the Cristina case that the English Courts will not allow the arrest of a ship which was in the possession of a foreign sovereign State, inasmuch as to do so would be an infraction of the rule well established in International Law that a sovereign State cannot, directly or indirectly, be impleaded without its consent. Lord Atkin observed in that case that the proposition that the courts of a country will not implead a foreign sovereign had been engrafted into their domestic law. In such circumstances the intervention of the neutral State was not necessary to obtain their release.

In the case of the Ambiorix the German Supreme Prize Court observed : "A captured vessel can be condemned if it is established to the satisfaction

State v. Brewster, 7 Vt. 118.
 119 U. S 407.

<sup>3.</sup> Annual Digest (1933-34) Case No. 150.

<sup>4. (1938)</sup> A. C. 485.

of the Court that the capture took place outside neutral territorial waters. it took place within the limits of the sovereignty of a neutral State, the act of capture is null and void, and the seizing State can derive no rights therefrom. The question whether in a given case these restrictions on the right of capture have been observed must, accordingly, be examined by the Court ex officio, and if it cannot be answered in the affirmative, the seizure cannot be upheld."

To the same effect are the observations of Lord Stowell in the case of the Vrow Anna Catherina.1 "The sanctity of a claim of territory is undoubtedly very high. When the fact is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy."

The English prize courts have, therefore, followed the principle that the seizure of enemy vessels in the territorial waters of a neutral State is an infraction of International Law and enables the neutral State to claim the release of the seized vessels in court or by way of international negotiation.

Seizures on high seas .- As regards seizures on the high seas in circumstances not authorised by International Law, it was observed by a United States Court in United States v. Ferris2 that as the scizure of British subjects was effected on a lanamanian vessel 270 miles off the coast of United States, i.e., far outside the limit laid down by the Treaty of 1924 between the United States and Panama, it was sheer aggression and trespass contrary to the treaty, not to be sanctioned by any Court, and could not be the basis of any proceedings adverse to the defendants.

Similar observations were made by the Supreme Court in Cook v. United States3. "The odjection is that the Government itself lacked power to seize since by the Treaty (of 1924 between Great Britain and the United States) it has imposed a territorial limitation upon its authority. Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty."

A contrary view was expressed by a United States Circuit Court of Appeals in the case of United States v. Ford wherein the Court held that British subjects seized on the high seas could be tried for an infraction of United States Prohibition Laws for it was sufficient that the defendants were before the Court, and the jurisdiction was not impaired by the manner in which they were brought before the Court.

Summing up his conclusions in a well-written article, Felice Morgenstern observes that the principle that rights-including the right of jurisdictionshall not be acquired as a result of an illegality would seem to embody a requirement of justice of overriding importance. He submits that it is the duty of courts to administer the law with an eye not only to the merits of each individual case but also to higher considerations of legality.

 <sup>(1803) 5</sup> C. Rob. 15.
 Annual Digest (1927 228 U. S. 102. Annual Digest (1927-28) Case No. 127.

<sup>228</sup> U.S. 102.

<sup>4.</sup> Annual Digest (1925-26) Case No. 110.

<sup>5.</sup> Jurisdiction in Seizures Effected in Violation of International Law. The British Year Book of International Law, 1952, pp. 265, 281.

#### CHAPTER XXIII

#### NATIONALITY

What is Nationality?—Nationality is the character or quality arising from membership of some particular nation or State which determines the political status and allegiance of a person. It is the most important link between an individual and a State. According to Oppenheim it is the quality of an individual "of being a subject of a certain State, and therefore its citizen." It is a continuing legal relationship between the sovereign State and the citizen. The legal relationship involves the conferment of rights and imposition of corresponding duties upon both. A man's nationality is not necessarily the same from his birth to his death. He may according to circumstances lose his nationality in the course of his life. He may elect to become a citizen of another State.

Citizenship or nationality is the status of an individual who legally belongs to a certain State or—formulated in a figurative way—is a member of that community.

Nationality refers to the relationship between a State and an individual which is such that the former may with reasons regard the latter as owing allegiance to itself.

Nationality may be defined as the status of membership of the collectivity of individuals whose acts, decisions and policy are vouchsafed through the legal concept of the State representing those individuals.

Nationality may be defined as the bond which unites a person to a given State, which constitutes his membership in the particular State, which gives him a claim to the protection of that State and which subjects him to the obligations created by the laws of that State.

Harvard Draft Declaration on Nationality.—It defines 'nationality' as the 'status' of a national person who is attached to a State by the tie of allegiance.

In the R. J. Lynch Glaim<sup>5</sup> (1929) the British Mexican Claims Commission elucidating the concept of nationality observed: "A man's nationality forms a continuing state of things and not a physical fact which occurs at a particular moment. A man's nationality is a continuing legal relationship between the sovereign State on the one hand and the citizen on the other. The fundamental basis of a man's nationality is his membership of an independent political community. I his legal relationship involves rights and corresponding duties upon both—on the part of the citizen no less than on the part of the State."

Determination of Nationality.—The question of the determination of nationality falls within the domain of municipal law and not International Law. The right to nationality is not a 'natural' right. Nationality is the basis of international protection, being the indispensable link between the individual and International Law. Due to increasing international intercourse and traffic, however, conflict of municipal nationality law is not infrequent. The

1. Hans Kelsen: Principles of International Law, p. 248.

Op. Cit., C. C. Hyde, Nationality, I 809.
 J. G. Starke: An Introduction to International Law. 7th Ed., p. 336.

Charles G. Fenwick: International Law. p. 301.
 A J. I L 15 (1931), p. 754.

N

Hague Codification Conference in the year 1930 adopted several instruments with ragard to nationality, e.g., Convention on the Conflict of Nationality Laws, Protocol on Statelessness, etc. It left for determination of each State as to who are its nationals under its own law, which law is to be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality. (Art. 1).

The United States Supreme Court observed in S. I., v. Wong Kum Ark<sup>1</sup>: "It is the inherent right of every independent nation to determine for itself and according to its own constitution and laws what classes of persons shall be entitled to its citizenship."

To the same effect are the observations in the Stoeck v. Public Trustee<sup>2</sup>: "The question to what State a person belongs must ultimately be decided by the municipal law of the State to which he claims to belong to or to which it is alleged that he belongs."

Incidents of nationality at International Law.—According to Starke the various important incidents of nationality at International Law are (i) the right to diplomatic protection abroad; (ii) the responsibility of the State for its failure to prevent certain wrongful acts committed by its national or to punish him after these wrongful acts are committed in another State; (iii) the duty of a State to receive back on its territory its own nationals; (iv) the duty of the national to perform military service for the State to which he owes allegiance; (v) general right of the State to refuse extradition of its own nationals to another State requesting surrender; (vi) determination of enemy status in time of war according to the nationality of the person concerned; and (vii) exercise of jurisdiction by States on the basis of nationality.

In consonance with the above incidents Sir John Fischer Williams very aptly remarked: "The modern world is a world of individuals organised into or under States: it is just as such an international question to what State a man belongs as to what State a territory belongs. International right and duties depend constantly on the nationality of individuals. To say that for questions of nationality there is no International Law is to hand over a large mass of international matters to anarchy. But this is not to deny that according to International Law nationality as a general rule is left to be settled by municipal regulations." 3

Nationality, Domicile and Allegiance-There is a subtle difference between nationality and domicile. Nationality, as explained above, is the character or quality arising from membership of some particular nation or State and determines the allegiance of a person. Domiçile is an attribute of nationality and connotes a person's place of residence. It is the relationship between the individual and the locality where he has his permanent home. Thus nationality may be acquired by domicile. The period of residence necessary to enable a person to acquire nationality varies in different countries. The political status of an individual by virtue of which he becomes the subject of a particular country, binding him by the tie of natural allegiance, is called his national character, while his civil status by virtue of which he acquires the character of a citizen of some particular country, possessing certain municipal rights and subject to certain obligations, is referred to by the term 'domicile'. Allegiance is a term synonymous with national character implying the obligations and fidelity that an individual owes to the State whose national character he bears

<sup>1. 169</sup> U. S. 6<sub>1</sub>9 2. (1921) 2 Ch. 69.

<sup>3.</sup> British Year Book of International Law (1927), p. 51.

Nationality and Citizenship.—'Nationality' and 'citizenship' are not interchangeable terms. 'Nationality' has reference to the jural relationship which may arise for consideration under international law. On the other hand, 'citizenship' has reference to the jural relationship under municipal law. In other words, nationality determines the civil rights of a person, natural or artificial, particularly with reference to international law, whereas citizenship is intimately connected with civic rights under municipal law. Hence all citizens are nationals of a particular State, but all nationals may not be citizens of the State. In other words, citizens are those persons who have full political rights as distinguished from nationals, who may not enjoy full political rights and are still domiciled in that country.'

Modes of acquiring nationality.—According to Oppenheim there are

five modes of acquiring nationality. They are as under

birth. It may be according to jus soli, viz., the territory or locality of birth within the territorial jurisdiction of a given State, without regard to the status of parents, or jus sanguinis, viz., the nationality of the parents at birth, i.e., principle of descent; or according to both.

The vast n ajerity of the people of the world acuqire their nationality by Germany adopts the test of parentage (jus sanguinis) as the decisive factor for determination of one's nationality, the child having been born at home or abroad. Other countries which adhere solely to jus sanguinis (that it, parentage is the deciding factor), are Austria, China, Denmark, Finland, Hungary, Japan, the Netherlands, Norway, I oland, Rumania, Sweden, Switzerland Turkey and the U. S. S. R. In Argentina, Bolivia, Brazil, Chile, Cuba, Panama, Paraguay, Peru and Uruguay, however, the decisive factor to determine one's, nationality is the territory on which a child is born, (viz., jus soli) irrespective of the fact whether its parents are citizens or aliens. Countries like Great Britain and the U. S. A. adopt a mixed principle. According to the Brtish Nationality Act, 1948, every person born within Her Majesty's dominions and allegiance and born out of Her Majesty's dominions and whose father was at that time a British subject born within Her Majesty's allegiance or whose birth was registered at a British consulate shall be deemed to be a natural born British subject. In the United States, according to the Immigration and Nationality Act of 1952, a person born in the United States and subject to the jurisdiction thereof, a person born in the United States to a member of an Indian, Eskimo, Alcutian, or other aboriginal tribe and a person born outside the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had residence in the United States or one of its outlying possessions prior to the birth of such person shall be nationals and citizens of the United States at birth.

The second mode of acquiring nationality is by naturalisation. It takes place when a person becomes the subject of a State to which he was before an alien. It is an artificial tie of allegiance between the person and the State where that person resides. There are six ways of naturalisation, viz., (1) marriage, i.e., wife assuming her husband's nationality, (2) legitimation whereby the illegitimate child acquires nationality of the father, (3) option, (4) acquisition of domicile, (5) appointment as Government official, and (6) grant on application to the State authorities. Naturalisation is permissible only in case the alien applies for ite-

According to Kelsen, "naturalisation is an administrative act of the State

<sup>1.</sup> Vide P. Weis-Nat onality and Statessness in International Law, pp. 4. 6; and Oppen-heim's International Law, Vol. I, pp. 642, 644.

conferring citizenship upon an alien but there is a rule of general International Law prohibiting the conferring of citizenship upon an alien without his consent. Hence naturalisation is admissible only in case the alien applies for it. No alien has a claim to be naturalised."

It was observed by an American Court in In re. Pezzi that naturalisation is a matter of favour, and not of right, and requires strict compliance with the acts of Congress.

It was observed by the Supreme Court in the case of United States v. Ginsburg: "An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to can another legislative will in respect of a matter so vital to the public welfare. No alien has the slightest right to naturalisation, unless all statutory requirements are complied with."

The third mode of acquiring nationality is by redintegration or resumption. Such individuals, who having lost their original nationality their long residence or naturalisation abroad may recover or resume their original nationality on fulfilling certain conditions.

The fourth and fifth modes of acquiring nationality are by subjugation and by cession of territory. Subjugation implies conquest and annexation of the territory conquered, Through annexation the territory comes under the sovereignty of the conqueror and the inhabitants of the subjugated or ceded territory acquire the nationality of the acquiring State.

Another ground of acquisition is a legislative or administrative act conferring citizenship upon a person.

British Nationality Act.—In this connection the provisions of the British Nationality and Status of Aliens Acts, 1914-1922, may be noted. According to S. I, the following are natural born British subjects: Any person (a) born within His Majesty's dominions and allegiance; (b) born out of His Majesty's dominions (i) whose father was at that time a British of the Crown, or (ii) whose birth was registered at a British consulate within one year (exceptionally, two years) of its occurrence.

- U. S. Nationality Act.—According to the Immigration and Nationality Act, of 1952, the following shall be nationals and citizens of the United States at birth
- (1) A person born in the United States, and subject to the jurisdiction
- Eskimo, Aleutian, or other aboriginal tribe......;
- (3) A person born outside the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions prior to the birth of such person
- (4) A person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of States in the other of whom is a national, but not a citizen of the United States:

- (5) A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a coninuous period of one year at any time prior to the birth of such person
- (6) A person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States:
- (7) A person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totalling not less than ten years, at least five of which were after attaining the age of fourteen years;......".

"Unless otherwise provided the following shall be nationals but not citizens of the United States at birth:

- (1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession;
- (2) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had residence in the United States, or one of its outlying possessions prior to the birth of such person; and
- (3) A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown prior to his attaining the age of twenty-one years, not to have been born in such outlying possession.

The United States Supreme Court has held that "the statutes which automatically—without prior Court or administrative proceedings—impose forfeiture of citizenship are essentially penal in character, and consequently deprive the appellees of their citizenship without due process of law and without according them the rights guaranteed by the Fifth and Sixth Amendments and that Ss. 401 (j) and 349 (a) (10) are consequently invalid because in them Congress has plainly employed the sanction of deprivation of nationality as a punishment—for the offence of leaving or remaining outside the country to evade military service—without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments."

Double Nationality.—There is no uniform rule in different States as to whether nationality is acquired by the nationality of the parents at birth or the territory or locality of birth. The result is that the practice of nations varies widely. Great Britain, the United States and a number of Latin-American States adhere primarily to the principle of jus soli, i. e., mere birth upon the soil confers nationality. Even the child of an alien born in England or America acquires the British or American nationality, as the case may be. France, Germany and other European countries adhere primarily to jus san-

<sup>1.</sup> Kennedy, Attorney General v. Mendoza Martinex; Rusk, Secretary of State v. Cort, 372 U. S. 144 (Fe bruary 18, 1963).

guinis by which the nationality of children follows that of their parents, so that children born of their subjects become ipso facto by birth their subjects whether born at home or abroad. This rule excludes illegitimate children who acquire the nationality of their mother. Thus a conflict of jurisdiction might arise when a child is born on the soil of one State of parents who are citizens of another State. For example, a child born in the United States of French parents is an American citizen jure soli, but the child is at the same time a French citizen jure sanguinis. His effective citizenship will then depend upon the jurisdiction within which he happens to be. In the United States, he is an American; in France, a Frenchman; in any other country he is both. Similarly, a child born in Great Britain of German parents acquires two nationalities at the same time, viz. British and German. This double nationality can, however, cease if the person on coming of age declares his alienage.

Double or dual nationality may result from marriage. When an American woman marries an Englishman, the American woman would, according to British law, acquire British nationality, although she would not also cease to be a United States citizen unless she has made a formal renunciation of her citizenship before a court having jurisdiction over naturalisation of aliens,

The diplomats call persons possessing double or dual nationality as sujets mixtes or mixed subjects.

The Hague Codification, Conference of 1930 provided that a pers on having two or more nationalities might be regarded as its national by each of the States whose nationality he possesses and that the person could renounce one of them with the permission of the State whose nationality he wished to surrender. A third State shall, however, recognise only the effective nationality of an individual possessing double nationality. The effective nationality meant either the nationality of the State in which he is habitually and principally resident or the nationality of the State with which he is most clearly connected.

The relevant cases on double nationality are the Ganevaro case, William

Mackenzie Claim and Kramer v. Attorney General.

In the Canevaro case between Italy and Peru the facts were that Canevaro was born on Peruvian territory and, therefore, according to Peruvian law, was a Peruvian by birth. He was born of an Italian father and as such he was under Italian law an Italian by birth. The Permanent Court of Arbitration observed that "as a matter of fact, Rafael Canevaro has on several occasions acted as a Peruvian citizen, both by running as a candidate for the Senate where none are accepted except Peruvian citizens and, particularly, by accepting the office of Consul General for the Netherlands, after having secured the authorisation of both the Peruvian Government and the Peruvian Congress......Under these circumstances, whatever Rafael Canevaro's status as a national may be in Italy, the Government of Peru has a right to consider him a Peruvian citizen and to deny his status as an Italian claimant."

Nationality in India.—The provisions with regard to nationality in India are to be found in its Constitution. There is one citizenship for the whole of India and there are no detailed provisions in the Constitution to determine nationality, the matter having been left to be determined by Parliament (Art. 11), which has since enacted the Citizenship Act, 1955. Article 5 lays down that at the commencement of the Constitution, viz, January 26,

1950, every person who has his domicile in the territory of India and

<sup>1.</sup> Fenwick : International Law, Third Edition, p. 251.

(a) who was born in the territory of India; or

(b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.

Article 6 relates to the citizenship of persons who have migrated to the territory of India from the territory of Pakistan. Article 8 provides that any person who or either of whose parents or any of whose grand-parents was born in India who is residing in any country outside India shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is residing on an application made by him to such diplomatic or consular representative. Article 9 provides that no person who has voluntarily acquired the citizenship of a foreign State shall be a citizen of India.

The Citizenship Act, 1955, provides for the modes of acquisition of Indian citizenship after the commencement of the Constitution by birth, descent, registration, naturalisation and incorporation of territory. Under S. 3 every person born in India on or after the 26th January, 1950, shall be a citizen of India by birth. Under S. 4 a person born outside India on or after the 26th January, 1950, shall be a citizen of India by descent of his father is a citizen of India at the time of his birth. Under S. 5 the prescribed authority may, on application made in this behalf, register as a citizen of India any person who is not already such citizen by virtue of the Constitution or by virtue of any of the other provisions of the Act and belongs to the categories mentioned therein. Under S. 6 the Central Government may on a proper application grant to the applicant a certificate of naturalisation if he fulfils the requirements of the provisions of the Third Schedule. Finally, under S. 7, if any territory becomes a part of India, the Central Government may, by order notified in the Official Gazette, specify the persons who shall be citizens of India by reason of their connection with that territory.

The Act also seeks to recognise Commonwealth citizenship and permits the Central Government to extend on a reciprocal basis such rights of an Indian citizen as may be agreed upon to the citizens of other Commonwealth countries and the Republic of Ireland?

Loss of Nationality .- According to Oppenheim there are five modes of

losing nationality, which are as under :

1. Release. Some States, such as Germany, grant their citizens the right to ask to be released from nationality.

 Deprivation.—Certain States have framed some municipal laws the breach of which by its nationals results in the deprivation of their nationality.

Under the American laws service in the armed forces of a foreign State also results in deprivation of citizenship.

- 3. Expiration.—In certain States on account of legislation citizenship expires due to long stay alroad. A naturalised American citizen loses his nationality by having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated.<sup>2</sup>
- 4. Renunciation.—In the case of double nationality of children the municipal laws of certain States (Great Britain) give them a right on coming of age to declare whether they wish to cease to be a citizen of one State. The British Nationality Act of 1948 permits such a child to make a declaration of

1. U. S. ex. rel. Marks v. Esperdy, 315 F. 2d. 673.

<sup>2.</sup> S. 352 (a) (1), Immigration and Nationality Act, 1952.

the renunciation of citizenship of the United Kingdom, but the registration of such a declaration may be withheld by the Secretary of State if made during any war in which the United Kingdom be engaged.

5. Substitution.—According to the laws of some States the nationality of their subjects is extinguished by their naturalisation abroad. The British Nationality Act of 1948 does not automatically entail loss of British nationality on the naturalisation of a British subject in a foreign State. The United States Nationality Act of 1952, however, entails loss of American nationality on the voluntary naturalisation of an American national in a foreign country.

The Constitution of India provides for the loss of citizenship in the following two circumstances:

- (1) A person who after the 1st of March, 1947, migrated from the territory of India to the territory of Pakistan shall not be deemed to be a citizen of India. (Art. 7).
- (2) No person shall be a citizen of India it he has voluntarily acquired the citizenship of any foreign State. (Art. 9).

The Indian Citizen ship Act, 1955, provides for the termination and deprivation of citizenship under certain circumstances. Under S. 8 of the Act if any citizen of India of full age and capacity, who is also a citizen or national of another country, makes in the prescribed manner a declaration renouncing his Indian citizenship, the declaration shall be registered by the prescribed authority and upon such registration, that person shall cease to be a citizen of India. Under S. 9 any citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th January, 1950, and the commencement of the Citizenship Act, 1955, i. e., December 30, 1955, voluntarily acquired the citizenship of another country shall, upon such acquisition or, as the case n ay be, such commencement, cease to be a citizen of India. Under S. 10 a citizen of India who is such by naturalisation or by relevant provisions of the Constitution shall cease to be a citizen of India, if he is deprived of that citizenship by an order of the Central Government under this section.

Child's domicile.—It is an accepted principle of private international Law that the domicile of an infant automatically changes with any change that occurs in the domicile of his father. As between a living father and his infant, there is unity of domicile even though they may reside in different countries. This unity is not destructible at the will of the father.

Statelessness.—The problem of statelessness has of late assumed some importance due to conflict of laws relating to nationality. There have also been cases where nationality has been lost due to the failure of nationals of a certain State to return to their own country. Numerous Russians lost their nationality after the Revolution because they were unwilling to return to Russia.

It was observed by Russel, J. in the case of Stoeck v. The Public Trustee' that statelessness is a condition recognised by English Law. Russell, J. quoted with approval the following observations of Oppenheim: "A person may be destitute of nationality knowingly or unknowingly, intentionally or through no fault of his own."

A stateless person, viz., a person without a nationality, is peculiarly open to persecution and general hardship.

Oppenheim mentions several cases of statelessness. He says that even by birth a person may be stateless. Thus an illegitimate child born in Germany

1. (1921) 2 Ch. 67.

of an English mother is actually destitute of nationality, because according to German Law it does not acquire German nationality, and according to British Law it does not acquire British nationality. Thus, further, all children born in Germany of parents who are destitute of nationality are themselves, according to German Law, stateless. Further, the child of parents who are nationals of States following the jus soli principle (that is, the territory on which the birth occurs is the determining factor), born in the territory of a State wherein nationality at birth is determined by jus sanguinis (that is, parentage is the deciding factor), is without a nationality. The parents' state does not confer nationality because the child was not born on its territory, while the State Obviously, the child is stateless. But statelessness may also take place after birth, i.e., by deprivation of nationality. All individuals who have lost their original nationality without having acquired another are, in fact, destitute of nationality.

The Hague Convention of 1930 on the Conflict of Nationality Laws no doubt desired to end the state of statelessness and double nationality, but the provisions contained therein did not help much for want or ratification on the part of the States. The Convention provided that a child whose parents are unknown or who have no nationality, or whose nationality is unknown, are to have the nationality of the country of birth. Such efforts are, however, symptomatic of the fact that there is a keen desire on the part of nations to mitigate the inconvenience and hardship that accrues to Government and individuals on account of statelessness. They also reveal that the subject of nationality has received considerable interest and has been the subject of international negotiation and regulation, but the tanacity of States in adhering to their unfettered discretion, has not smoothened the way to any satisfactory arrangement.

The Hague Codification Conference of 1930 concerned itself with the question of children of parents without nationality becoming stateless if jus sanguinis were the sole criterion for determining nationality at birth. The Protocol Relating to a Certain Case of Statelessness aimed to eliminate statelessness of the child born in a state adhering to jus sanguinis, but permitting only the father to transmit nationality by descent. Article 1 of the Protocol provided:

"In a State whose nationality is not conferred by the mere fact of birth in its territory, a person born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality of the said State."

Article 15 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws provided:

"Where the nationality of a State is not acquired automatically by reason of birth on its territory, a child born on the territory of that State of parents having no nationality, or of unknown nationality, may obtain the nationality of the said State. The law of that State shall determine the conditions governing the acquisition of its nationality in such cases."

Article 14 provided :

"A child whose parents are both unknown shall have the nationality of the country of birth. If the child's parentage is established, its

45 A. J. I. 1., (1951), pp. 476-477

nationality shall be determined by the rules applicable in cases where the parentage is known.

A founding is, until the contrary is proved, presumed to have been born on the territory of the State in which it was found."

Stateless minors.—The Convention on Nationality adopted at the Hague Codification Conference of 1930 sought to avoid the occurrence of statelessness in minors by making the loss of nationality conditional upon the acquisition of the nationality of the parents. Article 13 provided that naturalisation of the parents shall confer on such of their children as, according to its law, are minors the nationality of the State by which the naturalisation is granted.

Statelessness as a result of marriage.—There are three doctrines of nationality in relation to marriage, viz., the doctrine of the unity of the family, whereby the wife's nationality merges in, or follows, that of the husband; (2) the doctrine of the independence of the woman's citizenship; and (3) a combination of these doctrines.

Afghanistan, Bolivia, Egypt, Germany, Haiti, Hungary, India, Iran, Iraq, Ireland, New Zealand, Palestine, Poland, Peru, Siam, Spain, Switzerland, and Union of South Africa follow the principle of the unity of the family, and the woman national 1 ses her nationality upon marriage to an alien.

Argentine, Australia, Bulgaria, Brazil, Canada, Chile, Colombia, Cuba, Czechoslovakia, El Salvador, Guatemala, Mexico, New Zealand, Panama, Paraguay, Rumania, United Kingdom, United States, U. S. S. R., Uruguay, Venezuela and Yugoslavia, on the other hand, do not confer nationality upon a foreign woman who marries a national.

The nationality laws of certain states (e. g., Czechoslovakia, Hungary, Iraq, Poland, Spain and Switzerland) provide that a change in the husband's nationality during marriage affects the wife; but in certain other countries, e. g., Austria, Canada, China, Finland, France, Germany, etc, the wife becomes stateless if the husband acquires the nationality of a state which does not automatically confer its nationality upon the wife. Again, in certain other countries, naturalisation of an alien does not extend to the wife.

Most nations which follow the doctrine of family unity generally allow an alien woman who acquired their nationality by marriage to a national to retain their nationality after the dissolution of marriage.

The State within whose territory the stateless persons inhabit can require them, if their number increases considerably, to apply for naturalisation or direct them to leave the country. As these stateless persons belong to no country and do not own a nationality, they are deprived of the benefits that International Law secures to the citizen of a State.

The Convention relating to the International Status of Refugees, 1933, obliged the contracting States not to expel the refugees regularly residing in the states concerned and to grant them free access to the courts. This was in relation to the treatment of Russian, American and other assimilated refugees.

Another Convention on the Status of Refugees was made in July 1951, protecting persons who became refugees before the 18th January, 1951, from discrimination on account of race, religion or country of origin. They were to be afforded equal treatment with nationals with regard to elementary education, public relief and social security. They were also given religious freedom.

<sup>1. 45</sup> A. J. I. L. (1911), pp. 484-487.

International Law Commission.—The International Law Commission selected nationality including statelessness as a topic for codification at its first session in 1949. It prepared Draft Conventions on the Elimination of Future Statelessness and on the Reduction of Future Statelessness. The preamble after referring to the Universal Declaration of Human Rights proclaimed that everyone has the right to a nationality and that it required cooperative action between the member states to solve the problem of statelessness. of the Draft Convention on the Reduction of Future Statelessness provides that a child who would otherwise be stateless shall acquire at birth the nationality of the party in whose territory it is born. Any person born on board a vessel at sea shall have the nationality of the State whose flag the vessel flies. Under Art. 3 if such birth takes place on board an aircraft nationality is to be that of the place where the aircraft is registered. If the law of a State entails the loss of nationality as a consequence of a change in the personal status of a person such as marriage, legitimation or adoption, Article 5 provided that such loss shall be conditional upon acquisition of another nationality. Under Art. 6 renunciation shall not result in loss of nationality unless the person renouncing it has or acquires another nationality. Persons shall not lose their nationality, so as to become stateless, on the ground of departure, stay abroad, or failure to register or on any other similar ground. The States are not to deprive their nationals of nationality by way of penalty if such deprivation renders them stateless. No person is to be deprived of his nationality on racial, ethnical, religious or political grounds, nor shall the transfer of territory automatically result in the loss of nationality on the part of the inhabitants of such territory. A special agency has been envisaged within the United Nations to enforce the above recommendations and hear complaints of the individuals concerned.

The International Law Commission observed in its sixth session (1954) that statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by International Law.

Expatriation.—Expatriation is the voluntary renunciation or abandon-ment of nationality and allegiance. The right of expatriation falls within the ambit of municipal law on the same principle as the question of nationality. The States have exclusive jurisdiction to determine the circumstances in which a citizen can be divested of his national status. This principle was given effect to in the Richards Claim, a matter agitated before the Mixed Claims Commission between Great Britain and the United States, and the Umpire general right of expatriation. The right of expatriation is an inherent and natural right of all persons, being based on the principle of the rights of man and of the liberty of the human race.

### CHAPTER XXIV

# EXTRADITION CONNECTED WITH JURISDICTION

Its Necessity .- Where a person who has committed an offence in one country escapes to another, what is the duty of the latter with regard to him? Should the country of refuge try him in its own Courts, according to its own laws, or deliver him up to the country whose law he has broken? general questi on International Law gives no certain answer. Some jurists-Grotius, Vattel and Kent among them-were inclined to hold that a State is bound to give up fugitives accused of crimes affecting the general peace and security of the society, but the majority-Puffendorf, Voet and Heffier among them-appear to deny the obligation, as a matter of right, and prefer to put it on the ground of comity.' It is argued that independence and sovereignty of States is supreme and does not warrant the exercise by one State of the slightest act of jurisdictional authority within the territory of another State. But mutual interest of States for the maintenance of law and order and the administration of justice demands that nations should co-operate with one another in surrendering fugitive criminals to the State in which the crime was committed. Moreover there is the obvious advantage in prosecuting the offender in the country where he has committed the offence since the evidence is more freely available there and that State has the greatest interest in the punishment of the offender as also facilities for ascertaining the truth. universal practice of nations, however, is to surrender fugitive offenders only in consequence of some special treaty with the country which demands them, and few jurists now affirm any general duty or perfect obligation. The surrender in accordance with treaty and in compliance with a formal demand is known as extradition. The extradition treaties can be brought into force only after certain necessary formalities have been observed, including their incorporation in the municipal law of the States wanting to enforce them.

## DEFINITION A

Lawrence defines extradition as "the surrender by one State to another of an individual who is found within the territory of the former, and is accused of having committed a crime within the territory of the latter; or who, having committed a crime outside the territory of the latter, is one of its subjects and, as such, by its law amenable to its jurisdiction."1

According to Oppenheim "extradition is the delivery of an accused or a convicted individual to the State on whose territory he is alleged to have committed, or to have been convicted of, a crime, by the State on whose

territory the alleged criminal happens for the time to be."2

Extradition is "the surrender of a person-accused or convicted of a crime by the State in the territory of which he has taken refuge to the State in whose territory the crime has been committed or which has convicted him of the crime."

The term 'extradition', according to Starke, denotes the process whereby under treaty or upon a basis of reciprocity one State another State at its request a person

T. J. Lawrence The Principles of International Law, 7th Ed., p. 235.
 L. Oppenheim: International Law, 8th Ed. p. 696.

Convicted of a criminal offence committed against the laws of the requesting State, such requesting State being competent to try the alleged offender.1

Extradition, observed Chief Justice Fuller of the U. S. Supreme Court in Terlinden v. Ames, 2 is the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender.

Difficulties.—There are two practical difficulties about extradition which have prevented the growth of a uniform rule on the subject. They are the variations in the definitions of crime adopted by different countries and the possibility of the process of extradition being employed to get hold of a person who is wanted by his country not really for an ordinary crime, but for a political offence. Modern States almost invariably exclude offences

of a political character from the operation of the law of extradition.

English Extradition Act.—It is now generally agreed that surrender is a matter of comity and not of right. Each State is guided by treaty stipulations, and, in their absence, it has a right to refuse to surrender fugitives by granting them asylum in view of its territorial sovereignty. The Law of England appears to be strongly against surrender in the absence of treaty obligations. English Law does not warrant a surrender without express statutory authority. Such authority is now given by the Extradition Act of 1870, as amended by the Amending Acts of 1873, 1895, 1906, 1932 and 1935 but only in the case of the offences therein specified, and with regard to countries with which an agreement has been entered into, and to which the Act has been applied by an Order-in-Council.

V. S. Practice.—The position was summed up with clarity by the Supreme Court of the United States in the case of Factor v. Laubenheimer<sup>3</sup>: "The principles of International Law recognise no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so, the legal right to demand his extradition, and the correlative duty to surrender him to the demanding State exist only when created by treaty."

In the absence of treaty stipulation, it is always a matter of comity or courtesy. No government is understood to be bound by positive law of nations to deliver up criminals, fugitives from justice, who have sought an asylum

within its limits.

The United States, however, is a party to the Montevideo Convention on Extradition, 1933, which permits extradition of a person charged with an offence constituting a crime and punishable under the laws of the demanding and surrendering States with a minimum penalty of imprisonment for one year.

Jindian Extradition Act.—The Indian Extradition Act of 1962 lays down the procedure for the surrender of fugitive criminals by the Union Government after being satisfied, on the basis of an enquiry by a magistrate, that a prima facie case has been made out in support of the requisition. They can refuse to apprehend a fugitive criminal if the crime is of a political character. The Act substantially follows the provisions of the English Extradition Act.

2. 184 U.S. 270. 3. 290 U.S. 276, 287.

<sup>1.</sup> J. G. Starke: An Introduction to International Law, 7th Ed. p. 345.

Surrender of their own subjects.—In extradition cases there must be an extraditable person and an extraditable crime. Many States such as France, Germany and Italy have adopted the principle of never extraditing their own subjects to a foreign State who return home after committing a crime abroad, and reserve to themselves the right of punishing them. But Great Britain has not agreed with this view. By a treaty entered into with U. S. A. and Britain the subjects of each power are freely surrendered to the other. Even as early as in 1879, Great Britain surrendered to Austria one Tourville, a British subject, who after having murdered his wife in the Tyrol, had fled home to England. At any rate no duty to return their own nationals is recognized unless the treaty expressly stipulates such surrender.

The Montevideo Conference (1933) left the States free to decide whether to extradite their own nationals or not. The Harvard Research Draft Convention on Extradition, however, provided that a State shall not refuse to extradite its national, but on refusal it was bound to try its national for the alleged offence committed by him abroad.

Doctrine of Reciprocity.—If the requesting State be willing by past performance to surrender its own citizens for trial by the courts of another country, the detaining State will also be willing to surrender its own citizens.

The return of an offender to a State for his trial there under an ad hoc agreement or arrangement, in the absence of an extradition treaty, or irrespective of any stipulation in the treaty between the states concerned as to whether the alleged offence is an extraditable crime or not, is known as Rendition.

Certain international conventions such as the Geneva Convention of 1936 for the suppression of illicit traffic in dangerous drugs require each State to prosecute its nationals for crimes relating to counterfeiting of currency, drug trafficking, etc., even though the offence may have been committed abroad.

Necessary Conditions—The necessary conditions for extradition generally inserted in extradition treaties in compliance whereof the criminals are surrendered by one State to another through the diplomatic channel are the following:

(1) Offences of Political Character .- A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character. The term "political offence" is not easy to define. It is a question of some nicety. Different criteria are adopted by different nations with regard to its meaning. Some take the motive of the crime and others look to specific offences. It has, however, been established according to judicial decisions that to constitute a political offence there must be two or more parties, each seeking to impose a government of its own choice on the other or striving for political control in the State where the offence is committed, and the offence must be committed in pursuance of that objective. This naturally excludes anarchists and terrorists. The main object of anarchism is to reject law in general. It is opposed not only to established law but to every form of legal coercion. It wants to set aside law altogether and thus to dispense with governmental institution. The party of anarchists is, therefore, the enemy of all governments and its efforts are directed primarily against the general body of citizens.

In re Castioni, Castioni, a Swiss subject, had taken part in a political disturbance in Switzerland in the course of which he killed a Municipal Councillor, and later on fled to England. In the extradition proceedings

initiated on behalf of the Swiss Government the magistrate in England committed Castioni to prison holding that his offence in Switzerland was not of a political character. He applied for a writ of habeas corpus, which was issued by the Divisional Court. It was held that at the moment at which Castioni fired the shot the reasonable presumption was that he fired it thinking it would advance, and that it was an act which was in furtherance of and done intending it to be in furtherance of, the very object which the rising had taken place in order to promote, and to get rid of the Government, who, he might until he had absolutely got into the place, have supposed were resisting the entrance of the people to that place. The Queen's Bench Division accordingly let off Castioni from custody by holding that the offence was a political one and refused to order his extradition to Switzerland. It was held that an offence has a political character if it was "incidental to and formed part of political disturbances."

In the case of Meunier, the accused had caused explosions in a Paris case. Since he was an anarchist the offence of which he was charged could not be treated an offence of a political character. It was held by Justice Cave of the British Court that in order to constitute an offence of a political character, there must be two or more parties in the State each seeking to impose the government of their own choice on the other, and that, if the offence is committed by one side or the other, in pursuance of that object, it is a political offence otherwise not?

In 1934 the Italian Court of Appeal of Turin declined to extradite to France two persons, Pavelitch and Kvaternik, who were charged with having assassinated King Alexander of Yugoslavia and the French Minister of Foreign Affairs at Marseilles on October 9, 1934, on the ground that the assassination resulted from political motives which injured the political interests of Yugoslavia and as such constituted a political offence under the Italian Penal Code.

The rule that political offences are not extraditable was devised during the 19th century in view of great revolutions in various parts of Europe. The fugitives, who were leaders of the revolution, were given asylum by States like Great Britain and Switzerland and the above rule enabled them to protect their lives.

In the Fort case of Germany (1921) two persons accused of murdering the Spanish Prime Minister Dato in 1921, fled to Germany. They were extradited for trial in Spain, even though the German-Spanish treaty precluded extradition for political offences, the reason assigned being that the alleged murder was an act of revenge, possibly arising out of political motive but not committed with a view to achieving a political object.

In re. Kolezynski and others<sup>2</sup> an English Court held that the term "offence of a political character" was not and was not intended to be exhaustive. The term must always be considered according to the circumstances exising at the time when they have to be considered. The present time was very different from 1890 when Castioni's case was decided. It was not then treason for a citizen to leave his country and start a fresh life in another. The applicants in this case committed an offence of a political character for having revolted by the only means open to them.

 <sup>(1894) 2</sup> Q. B. 415.
 1955 I All E. R. 31.

In April 1962 the House of Lords dismissed the appeal of Antones Zacharia1, a Cypriot, from a decision of the Divisional Court of the Queen's Bench Division, dismissing the application of the appellant for a writ of habeas corpus against his surrender to the Republic of Cyprus. By S. 3 (1) of the Cyprus Act, 1960, the Fugitive Offenders Act, 1881, continued to apply to the Republic of Cyprus. Zacharia had left Cyprus for England with connivance and protection of the then Government of Cyprus. It was alleged that the Cypriot sought had taken prominent part in struggles in Cyprus before independence as an opponent of the group now in power, and his surrender was sought to stand trial for alleged offences in connection with the struggles. The House of Lords, while dismissing his appeal, held by majority that they were willing to assume that there were no improper motives behind the attempt to obtain him for trial and that he would be adequately protected against assassination in Cyprus before or during trial. It was further observed that it would not be unjust or oppressive to return Zacharia to Cyprus as it would be assumed in absence of sufficient evidence to the contrary that proper precautions would be taken against his assassination and the Cyprus Court would be competent to discriminate between fabricated and true evidence.

The Rt. Hon. Viscount Simonds in his judgment quoted with approval the observations of Lord Russell of Killowen G. J. In Re Arton?:

"I come now to the third, and last, ground upon which this rule has been moved...that the demand for extradition is not made in good faith and in the interests of justice. It has been pointed out by myself and my learned brothers during the argument that this is in itself a very grave and serious statement to put forward, and one which ought not to be put forward except upon very strong grounds; it conveys a reflection of the gravest possible kind, not only upon the motive and actions of the responsible government, but also impliedly upon the judicial authorities of a neighbouring and friendly power. Is it open to us at all to consider such a suggestion? In my judgment, it is not, and I have already stated the grounds for my opinion."

The Home Secretary announced on May 1, 1962, in the House of Commons, that he had decided, in the exercise of his discretion under S. 6 of the Act of 1881, that the appellant should not be returned to Cyprus. ]

Attentat Clause.—The rule that political offences are not extraditable is subject to an exception which is contained in the attentat clause that murder of the head of a foreign State or a member of his family is not to be considered a political crime. Its necessity was felt for the first time in Belgium following the case of Jacquin in 1854 who, domiciled in Belgium, caused an explosion with the intention of murdering the French Emperor Napoleon III. Request for extradition made by France was refused on account of the Belgian extradition law interdicting the surrender of political offenders. This necessitated the enactment of the attentat clause by Belgium. The U.S. A. has adopted the attentat clause. The Montevideo Convention on Extradition (1933) also included this clause.

Convention against Terrorism.—The Council of the League of Nations tried to bring about an international convention for the prevention

<sup>1.</sup> Zacharia v. Republic of Cyprus and another: Arestidon v. Same. (1962) All E. R.

<sup>2. (1896)</sup> Q. B. at p.114.

and punishment of crimes of a political character. The Convention was signed at Geneva on November 16, 1937, by twentythree States undertaking to treat as criminal offences acts of terrorism, including conspiracy, incitement and participation in such acts, and in some cases, to grant extradition for such offences. The Convention has not come into force, and it is difficult to foresee its ready acceptance by States at a time when the rampant suppression of civil liberties and the ruthless persecution of opponents in many countries "tends to provoke violent reactions of treasonable character against the Governments concerned".

Individuals have no rights under extradition treaties except the principle of non-extradition of political offenders, which has assumed the character of a rule of International Law.

The conception of 'political crime' present serious difficulties. Oppenheim observes that "whereas many writers consider a crime political" if committed from a political motive, others call 'political' any crime committed for a political purpose; again, others recognise such a crime only as 'political' as was committed both from a political motive and at the same time for a political purpose; and, thirdly, some writers confine the term 'political crime' to certain offences against the State only, such as high treason, lese-majeste, and the like. Up to the present day all attempts to formulate a satisfactory conception of term have failed ... "1

Neutral states and the Extradition of War Criminals. States generally do not surrender a fugitive unless the crime with which he is charged is either listed in an extradition treaty or is, at any rate, considered a criminal offence by the laws of the requested States. This principle of double criminality is incorporated in the majority of extradition statutes and treaties. Again the demand for extradition of a war criminal may be refused if his crimes constitute a political offence for which extradition cannot be granted.

The question arises as to what constitutes a political offence. According to French practice a person is a political offender who has been influenced solely by political passion to break the law.2

Pasquale Fiore considers political offenders as those persons who ..... cause trouble to the order established by the fundamental laws of the state, to the distribution of power, to the rights of the citizen, to the social order and to the rights and duties which result therefrom.3

Franz von Liszt includes in the expression "political crimes" as .....all premeditated crimes against the existence and the security of the criminal's own or a foreign state. Also, attacks against the head of the Government and the rights and liberties of the citizen.4

The Harvard Research Draft includes in the expression offender" as treason, sedition and espionage and any offence connected with the activities of an organized group directed against the security or the governmental system of the requesting State."5

1. Oppenheim: International Law, 8th Ed., p. 707.

2. Circulaire adresse ux services penitentiaires, issued by M. Barthou. 3. Pasquale Fiore. Traite de droit penal international et del'extradition (Paris, 1880)

French Translation by F. Antoine) Vol 11, p. 592

von Liszt, Lehrbuch des deutschen Strafrechts (18th) Edition, Berlin, 1911, 4. Franz p. 115.

5. Harvard Research Draft, loc cit. p. 112.

The German Extradition Act of 1929 has defined the expression as under:

Political acts are punishable offences aimed directly (unmittelbar) at the existence or the security of the state, against the head or a member of the government, against an institution or a corporation established by the constitution, against the rights of citizens in electing or voting, or against the good relations with foreign states. 1

Offences are also generally not subject to extradition proceedings, The rule is that extradition is not allowed for trifling cases, and the States ensure that only serious crimes do not go unpunished.

(3) Rule of Speciality.—The fugitive demanded shall not be liable to be tried for any offence committed prior to his surrender other than the specified offence mentioned in the request for his extradition until he has been liberated and has had an opportunity of leaving the country. This is known as the Principle of Rule of SPECIALITY.

In the case of United States v. Rouseher<sup>2</sup> (1886), Rauscher, a sailor, was surrendered by Great Britain to U. S. A. upon a charge of murder. He was, however, tried and convicted in U. S. A. upon a minor charge of inflicting cruel and unusual punishment to the man of whose murder he was before accused. On appeal the Supreme Court of the United States quashed the conviction and ordered the release of the prisoner on the ground that, unless otherwise provided for by treaty, the prisoner could only be charged with the offence for which he was extradited unless he was given a reasonable time to return to the country which surrendered him.

The Supreme Court observed. "The weight of authority and of sound principle are in favour of the proposition that a person who has been brought within the jurisdiction of the court, by virtue of proceedings under an extradition treaty can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release on trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."

In re. Arrietto,<sup>3</sup> the Italian Court of Cassation held that if the accused consents and the extradition treaty provides for such consent, he may be tried on charges other than those for which he had been extradited. But in the absence of a treaty provision to the contrary: there is no valid consent on the part of the extradited person to a prosecution on such charges. Vallerini v. Granai."4

The rule of speciality does not bar trial of a fugitive for an offence committed by him after the offences for which his extradition had been granted: Fioceoni and Kella v. Attorney General of the United States.

In the aforesaid case the petitioners, both French nationals, were extradited in October 1971 from Italy to the United States on charges of importing heroin and extradition was granted upon the basis of Italian law, as the

(1886) 119 U. S. 407.
 Annual Digest (1933-34) Case No. 140.

<sup>1.</sup> Act of Dec. 23, 19.9. Reichsgesetzblatt. 1929, Vol. I, Pt. I, p. 239.

Annual Digest (1935-34) Case No. 140.
 Annual Digest (1935-37) Case No. 176.
 339 F. Supp. 1242 : 1972 A. J. I. L. 867.

Extradition Convention with Italy of 1886 and supplementary conventions thereto did not include narcotics offences. The petitioners relied particularly upon the Supreme Court's holding in United States v. Rauscher that a person can only be tried for the offence for which he was extradited, even where the treaty did not so provide in terms. They argued that this principle applied whether extradition had been granted by treaty or, as in their case, by comity. Repelling the argument, the Court observed that violations of international law and acts allegedly constituting breaches of good faith where comity is involved are matters to be resolved by the political and executive branches of the respective governments. Courts are without power to remedy breaches of commitments among nations which are not the subject of treaty obligations. In the instant case, with no treaty or law to rely on, any claim that prosecution of the petitioners upon charges other than the one specifically referred to in the extradition warrant is in violation of its terms or is a breach of good faith owing from our government to the Italian government is a matter within the competence of the executive branches of both governments. It is not for the courts to interfere in such matters : Terlinden v. Ames .1

(4) Double Criminality.—The crime must be an offence in both the States. This is based on the principle of double criminality. No person is to be extradited whose deed is not a crime according to the criminal law of the State which is asked to extradite as well as of the State which demands extradition. The act complained of must be a crime under the laws of both the requesting and the requested States. Treaties generally embody a clause that acts punishable in both the countries with specified penalties shall only be extraditable.

In the case of Factor v. Laubenheimer and Haggard<sup>2</sup> the Supreme Court of the United States gave a liberal interpretation to the Extradition Treaty with Great Britain when it held that the offence with which the plaintiff was charged was an extraditable crime even though it was not punishable by the law of the State of Illionis where the plaintiff was taken in custody. The Court observed: "Once the contracting parties are satisfied that an identified offence is generally recognised as criminal in both countries, there is no occasion for stipulating that extradition shall fail merely because the fugitive may succeed in linding in the country of refuge, some state, territory or district in which the offence charged is not punishable."

(5) Surrender after his trial for offence committed in his own State.—A fugitive criminal who has been accused of some offence not being the offence for which his surrender is asked shall not be surrendered until after he has been tried and has served his sentence for the offence committed in the State requested to surrender.

(6) Reasonable Prima facie Evidence.—There must be reasonable prima facie evidence of the guilt of the accused. The requested State shall satisfy itself that the evidence submitted justifies prima facie judicial proceedings against the accused but it is not within the province of the Courts of such a State to try the case on its merits.

International Law also leaves to the States the right to grant asylum to foreign individuals by virtue of their territorial supremacy whose cases do not fall under stipulations of extradition treaties.

 <sup>184</sup> U. S. 270 (1902): 339 F. Supp. 1242.
 (1933): 290 U. S. 276.

Under the English Law a fugitive criminal is not actually surrendered until the expiration of 15 days from the date of his being committed to prison to await his surrender so as to enable him to file an application for a writ of habeas corpus.

Surrender of a person within the State to another is a political act.—The subject of extradition was succinctly dealt with by their Lordships of the Supreme Court of India in the State of West Bengal v. Jugal hishore More, and the following observations were made in that case:

Extradition is the surrender by one State to another of a person desired to be dealt with for crimes of which he has been accused or convicted and which are justiciable in the Courts of the other State. Surrender of a person within the State to another State-whether a citizen or an alien-is a political act done in pursuance of a treaty or an agreement ad hoc. It is founded on the broad principle that it is in the interest of civilized communities that crimes should not go unpunished, and on that account it is recognised as a part of the comity of nations that one State should ordinarily afford to another State assistance towards bringing offenders to justice. The law relating to extradition between independent States is based on treaties. But the law has operationnational as well as international. It governs international relationship between the sovereign States which is secured by treaty obligations. But whether an offender should be handed over pursuant to a requisition is determined by the domestic law of the State on which the requisition is made. Though extradition is granted in implementation of the international commitments of the State the procedure to be followed by the Courts in deciding, whether extradition should be granted and on what terms, is determined by the municipal law. Sanction behind an order of extradition is the international commitment of the State under which the Court functions, but Courts jealously seek to protect the right of the individual by insisting upon strict compliance with the conditions precedent to surrender. The Courts of the country which make a requisition for surrender deal, with the prima facie proof of the offence and leave it to the State to make a requisition upon the other State in which the offender has taken refuge. Requisition for surrender is not the function of the Courts but of the State, A warrant issued by a Court for an offence committed in a country from its very nature has no extra-territorial operation. It is only a command by the Court in the name of the sovereign to its officer to arrest an offender and to bring him before the Court. By taking a requisition in pursuance of a warrant issued by a Court of a State to another State for assistance in securing the presence of the offender, the warrant is not invested with extra-territorial operation. If the other State requested agrees to lend its aid to arrest the fugitive the arrest is made either by the issue of an independent warrant or endorsement or authentication of the warrant of the Court which issued it. By endorsement or authentication of a warrant the country in which an offender has taken refuge signifies its willingness to lend its assistance, in implementation of the treaties or international commitments and to secure the arrest of the offender. The offender arrested pursuant to the warrant of an endorsement is brought before the Court of the country to which the requisition is made, and the Court holds an inquiry to determine whether the offender may be extradited. International commitment or treaty will be effective only if the Court of a country in which the offender is arrested after enquiry is of the view that the offender should be surrendered.

<sup>1. (1970) 1</sup> S. C. J., 39.

Functions of the Courts in the two countries.—The functions which the Courts in the two countries perform are therefore different. The Court within whose jurisdiction the offence is committed decides whether there is prima facie evidence on which a requisition may be made to another country for surrender of the offender. When the State to which a requisition is made agrees consistently with its international commitments to lend its aid the requisition is transmitted to the police authorities, and the Courts of that country consider, according to their own laws, whether the offender should be surrendered—the enquiry is in the absence of express provisions to the contrary relating to the prima facie evidence of the commission of the offence which is extraditable, the offence not being a political offence nor that the requisition being a subterfuge to secure custody for trial for a political offence.

Once a magistrate decided that there was sufficient evidence to justify committal for trial the accused must be so committed and there was no provision in the Extradition Act, 1870, giving a magistrate any wider power in extradition proceedings than in ordinary domestic proceedings for committal for trial. By virtue of S. 10 of the Extradiction Act, 1870, the question whether it would be wrong, unjust or oppressive to surrender the fugitive was not one for the courts but for the Sectretary of State who was answerable to Parliament, but not to the courts for any decision he might make: Atkinson v. United States of America Government.

Extradition Act no bar to requisition of surrender of fugitive through diplomatic channel. In the State of West Bengal v. Jugal Kishore Mores their lordships of the Supreme Court of India observed that in the present case it was true that under the Indian Extradition Act XXXIV of 1962 no notification had been issued including Hong Kong in the list of Commonwealth countries from which extradition of fugitives from justice might be secured. The provisions of the Extradition Act, 1962, could not be availed of for securing the presence of the fugitive More for trial in India, But that did not operate as a bar to the requisition made by the Ministry of External Affairs, Government of India, if they were able to persuade the Colonial Secretary, Hong Kong, to deliver him for trial in this country. If the Colonial Secretary of Hong Kong was willing to hand him over for trial in this country, it could not be said that the warrant issued by the Chief Presidency Magistrate for his arrest with the aid of which requisition for securing his presence from Hong Kong was to be made, was illegal.

It could not be said that because of the enactment of the Extradition Act XXXIV of 1962 the Government of India was prohibited from securing through diplomatic channels the extradition of an offender for trial of an offence committed within India. There was no illegality committed by the Chief Presidency Magistrate, Calcutta, in sending the warrant to the Secretary Home (Political) Department, Government of West Bengal, for transmission to the Government of India, Ministry of External Affairs, for taking further steps for securing the presence of More in India to undergo trial.

2. (1970) I S. C. J. 39.

<sup>1. 1971</sup> A. C. 197 . 9 B. I. L. C. 408.

#### ASYLUM

Asylum.—According to Starke, the conception of asylum in international law involves two elements:—(a) shelter, which is more than merely temporary refuge; and (b) a degree of active protection on the part of the authorities in control of the territory of asylum.<sup>1</sup>

The Institute of International Law, at its Bath session in September 1950, defined the term "asylum" as under:

"Asylum is the protection which a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it."

The term 'asylum' is used to describe a number of legal notions: the grant by States of admission into their territory to refugees, the protection of refugees against return to a country in respect of which they fear persecution, and non-extradition of political offenders.<sup>3</sup>

The above elements of asylum will show that extradition is the antithesis of territorial asylum. Asylum stops, as it were, where extradition begins

Territorial and Diplomatic Asylum.—Asylum may be territorial, i. e. granted by a State on its territory; or it may be extra-territorial, i. e., grant ed to fugitives by a State within the precincts of its embassies or legations abroad. The former is called the territorial asylum and the latter diplomatic asylum.

The distinction between territorial asylum and diplomatic asylum was explained by the International Court of Justice in the Colombian-Peruvian Asylum Case 5:

"In the case of extradition (territorial asylum), the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty, the refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State.

"In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case."

Territorial Asylum.—According to traditional international law the right of territorial asylum is the right of sovereign States to grant asylum within their territory at their discretion. Territorial asylum derives its basis from the territorial supremacy of the State over all persons on its territory, whether subjects or aliens.

According to Art. 1 of the Convention on Territorial Asylum adopted at Caracas on March 28, 1954:

J. G. Starke : An Introduction to International Law, 7th Ed., p. 354.

Art. I of the Resolution, c/f. (1951) 45 AJIL., Supp. 15.
 Weis: Territorial Asylum (1966), 6 I. J. I. L., p. 174.

Op. Cit. Starke, p. 34
 I. C. J. (1950), p. 268 274.
 Oppenheim, p. 677.

7. Brochure, Research Committee on "Asylum in International Law", Allahabad

"Every State has the right, in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable without, through the exercise of this right, giving rise to complaint by any other State."

Similarly Article 1 of the Declaration on Territorial Asylum as adopted by the United Nations General Assembly in its resolution of December 14, 1967, states:

"Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke Art. 14 of the Universal Declaration of Human Rights including persons struggling against colonialism, shall be respected by all other States.

"The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity..."

"It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum,"

Under Art. 2, "Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.'

Principle of Non-Refoulement.—The principle of non-refoulement (i.e., protection of refugees against expulsion or return to a country where they fear persecution) finds place in Art. 3 of the Draft Declaration on Asylum adopted by the Human Rights Commission. It reads:

"No one seeking or enjoying asylum in accordance with the Universal Declaration of Human Rights should, except for overriding reasons of national security or safeguarding of the population, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is well-founded fear of persecution endangering his life, physical integrity or liberty in that territory...".

This principle has also been incorporated in Arts. 31, 32 and 33 of the Refugee Convention of 1951.

Art. 31. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees, who, coming directly from a territory where their life or freedom was threatened, enter or are present in their territory without authorization.

Art. 32. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

Art. 33. No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The right of asylum is not merely a tradition in Switzerland. It is a political principle and an expression of the Swiss conception of freedom and independence.

The British Government also grant political asylum to a foreigner, if in

1. Pan American Union, Law and Treaty Series, Washington, 19 4.

his own country he appears to them to be in danger of life, or liberty on political grounds or on grounds of religion or race.

It is also the traditional policy of the Government of the United States to grant refuge in its territory to persons whose lives are believed to be in jeopardy as a result of their political activities in a foreign country. The United States regards a request for political asylum as an administrative matter.

The Government of India grant asylum in the exercise of its executive discretion. In granting asylum to Dalai Lama and his Tibetan followers, India exercised her right as a sovereign State.

Diplomatic Asylum —As regards diplomatic asylum, Article 6 of the Harvard Research Draft on Diplomatic Privileges and Immunities provides:

"A sending State shall not permit the premises occupied or used by its mission or by a member of its mission to be used as a place of asylum for fu itives from justice."

In the Colombian-Peruvian Asylum Case<sup>2</sup> the Court while considering Latin-American treaties and practice by which asylum might in certain circumstances be granted to political offenders but not to persons accused of common crimes, concluded "that Colombia, as the State granting asylum, is not competent to qualify the offence (as political) by a unilateral and definitive decision, binding on Peru" and that "the principles of international law do not recognize any rule of unilateral and definitive qualification by the State granting diplomatic asylum." The Court holding that Peru had failed to prove the common-law nature of the crime of which it accused Haya de la Torre, found in favour of the counterclaim submitted by Peru, holding that the asylum granted to him by the Colombian Legation in Peru had been irregularly granted because Haya de la Torre had sought refuge in the Embassy some three months after the suppression of the military rebellion, which showed that the urgency prescribed by the Havana Convention as a condition for the regularity of asylum no longer existed.

In the case of the Soviet defector Aziz Ouloug-zade who had sought refuge in the American embassy in India before placing himself under the protection of the Government of India, the Government of India urged foreign mission in India to respect the well-established international practice of not affording asylum to any person within their premises and told them that it did not recognise the right of such mission to give asylum to any person. The Vienna Convention of 1961 also emphasized that diplomatic mission should not be used for purposes which were incompatible with the performance of their official functions.

Law of Expulsion and Extradition distinguished.—In the case of Hans Muller of Nurenburg v. Superintendent, Presidency Jail, Calcutta, the Supreme Court of India considered the question of expulsion of Hans Muller, who was a West German subject, and thus pointed out the distinction between expulsion as embodied in the Foreigners Act, and the law of extradition as embodied in the Extradition Act. The Foreigners Act, 1946, confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion. The law of extradition is quite different. Because of treaty obligations it confers a right on certain countries (not all) to ask that persons who are alleged to have committed certain specified offences on the

<sup>1.</sup> As enunciated by the Under Secretary of State, Welles, in 1936.

I. C. J. Reports 1950, p. 266.
 A. I. R. 1955 S. C. 367.

territories, or who have already been convicted of those offences by their courts, be handed over to them in custody for prosecution or 'punishment. But despite that the Government of India is not bound to comply with the request and has an absolute and unfettered discretion to refuse.

There are important differences between the two Acts. In the first place the Extradition Act applies to everybody, citizen and foreigner alike, and to every class of foreigner, that is to say, even to foreigners who are not nationals of the country asking for extradition. But because of Art. 19 of the Constitution no citizen can be 'expelled' (as opposed to extradition) in the absence of a specific law to that effect; and here is none; also, the kind of law touching expulsion (as opposed to extradition) that could be made in the case of a citizen would have to be restricted in scope.

A citizen who has committed certain kinds of offences abroad can be 'extradited' if the formalities prescribed by the Extradition Act are observed. A foreigner has no such right and he can be expelled without any formality beyond the making of an order by the Central Government. But if he is 'extradited' instead of being expelled, then the formalities of the Extradition Act must be complied with. The importance of the distinction will be realised from what follows; and that applies to citizens and foreigners alike.

The Extradition Act is really a special branch of the law of Criminal Procedure. It deals with criminals and those accused of certain crimes. The Foreigners Act is not directly concerned with criminals or crime though the fact that a foreigner has committed offences, or is suspected of that, may be a good ground for regarding him as undesirable. Therefore, under the Extradition Act warrants or a summons must be issued; there must be a magisterial enquiry and when there is an arrest it is penal in character; and—this is the most important distinction of all—when the person to be extradited leaves India he does not leave the country a free man. The police in India hand him over to the police of the requisitioning State and he remains in custody throughout.

In the case of expulsion, no idea of punishment is involved, at any rate, in theory, and if a man is prepared to leave voluntarily he can ordinarily go as and when he pleases. But the right is not his. Under the Indian law, the matter is left to the unfettered discretion of the Union Government and that Government can prescribe the route and the port or place of departure and can place him on a particular ship or plane. [See Ss. 3 (2) (b) and 6, Foreigners Act].

If the order is one of 'expulsion', as opposed to extradition, then the person expelled leaves India a free man.

The Foreigners Act is not governed by the provisions of the Extradition Act. The two are disitinct and neither impinges on the other. Even if there is a requisition and a good case for extradition, Government is not bound to accede to the request. It is given an unfettered right to refuse under S. 3 (1) of the Extradition Act.

Therefore, if it chooses not to comply with the request, the person against whom the request is made cannot insist that it should. The right is not his; and the fact that a request has been made does not fetter the discretion of Government to choose the less cumbrous procedure of the Foreigners Act when a foreigner is concerned, provided always, that in that event the person concerned leaves India a free man. If no choice had been left to the Government, the position would have been different but as Government is given the right to choose, no question of want of good faith can arise

merely because it exercises the right of choice which the law confers in ordering detention of the person under S. 3 (1) (b) of the Preventive Detention Act.

Deportation.-The principle arising out of the law of deportation envisages that the Secretary of State can deport an alien and put him on board a ship or aircraft for his own country if he considers it conducive to the public good that that should be done. Then there is the principle arising out of the law of extradition under which the officers of the Crown cannot and must not surrender a fugitive criminal to another country at its request except in accordance with the Extradition Act, 1870-1935, duly tulfilled. These two principles ultimately depend on the purpose with which the act is done. If the deportation is done for an authorised purpose, it is lawful; if it is done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it is unlawful.

Where the Home Secretary refused the applicant Dr. Robert Soblen (who had been convicted in the United States of conspiring to obtain and deliver defence information to the Soviet Union and was being forcibly flown to New York via London from Israel to which country he had fled leave to land at the London airport, because in his opinion the presence of the applicant in England was not conducive to the public good, the applicant could not complain of the refusal of leave to land. The Crown has the right to exclude any alien from his country without reason given. The Home Secretary can deport an alien to the country of his nationality, even though ha had fled from it when convicted of a non-extraditable offence and even though a request had been made by its government for his return. His discretion could not be questioned in any court, unless it were shown that the deportation order was a sham in that the Home Secretary did not genuinely consider it in the public interest to expel the alien : Regina v. Governor of Brixton Prison Ex Parte Soblen.1

Leading Cases and Principles on the Law of Extradition

1. Savarkar's Case .- In connection with extradition the case of France v. Great Britain concerning Savarkar may here be noted. Savarkar, an Indian and a British subject, was being transported in the P. and O. boat Morea to India for the purpose of his trial on a charge of high treason and abetment of murder. During the voyage on July 8, 1910, he made a dramatic bid to escape. The ship, S. S. Morea, was at Marseilles when the prisoner entered the water closet and squeezing himself through its porthole jumped into the s.a. The guards immediately noticed him and opened fire. Alternatively diving and swimming under a shower of bullets, he reached the port and climbed the quay, He was pursued by marine guards and seized by a French policeman, on French soil, who, in mistaken execution of his duty, handed him over to the captain without any extradition proceedings. Since Savarkar was a political offender, France demanded that Great Britain should give him up and ask for his extradition in a formal way in conformity with International Law. Great Britain did not comply with this demand. By consent on October 25, 1910, the matter was referred to the Permanent Court of Arbitration at The Hague. The award, while admitting that an irregularity had been committed by the handing over of Savarkar to the Baitish authorities, decided in favour of Great Britain holding that there was no rule of International Law imposing in such circumstances any obligation on the power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that power.

 <sup>(1963) 2</sup> Q. B. I. 243: 8 .B. L. C. 477.
 Permanent Court of Arbitration, (1911) No. IX.

This decision received trenchant criticism at the hands of jurists of repute. But the decision does not appear to be wrong when the surrounding circumstances and the principles laid down therein are considered as a whole. In the first place, the British Government had informed the French Government that Savarkar would be a prisoner on board the Morea while calling at Marseilles and the French Government had raised no objection. And, in the second place, as Lawrence sums up the conclusions, the decision in the case did not lay down more than that, when an irregularity has been committed by the agent of a State in surrendering an escaped prisoner to the authorities of another State, if it appeared that these agents acted in good faith, it was not necessary that the prisoner should be restored to the State which employed them and subsequently disowned their acts. The case is accordingly weakened as a precedent in view of the peculiar circumstances to which the decision was confined.

- 2. Godfrey's Case.—In Rex v. Godfrey' the term "fugitive' came in for interpretation and it was observed by Lord Hewart, C. J. that although "at the first blush it might appear that when a man is spoken of as a fugitive what is meant is that he fled from one country to another country, it seems that the words 'fugitive criminal' are equally satisfied whether the man has physically been present in that country or not, if he committed the crime there."
- 3. Ex-Kaiser's Case.—A somewhat unprecedented extradition case occurred at the end of the First World War when the Supreme Council, representing the Allied and Associated Powers demanded from Holland the surrender of William Hohenzollern, former Emperor of Germany, known as the ex-Kaiser, for being put on trial. The demand was based on Article 227 of the Treaty of Versailles which arraigned the German Emperor for having committed a supreme offence against international morality and the sanctity of treaties. The Dutch Government rightly refused to accede to the request on the ground that Holland was not a party to the Treaty of Versailles and that the agelong tradition of Holland always made this country a ground of refuge for the vanquished in international conflicts.
- 4. Extradition of Axis Leaders.—Before the conclusion of the Second World War, President Roosevelt in anticipation of the Axis leaders escaping to neutral countries expressed the hope in his statement in July 1943 that the neutral countries would not make their territory a place of refuge for the war criminals. Subsequently the Tripartite Conference in its Declaration of German Atrocities signed at Moscow in October 1943 announced that the three Allied Powers would pursue the guilty persons to the uttermost ends of the earth and would deliver them to their accusers in order that justice might be done. The contingency, however, did not arise as the leading members of the Nazi party were captured in their own country.
- 5. Mubarak Ali's Case.—In re Government of India and Mubarak Ali Akmad' the Queen's Bench referred with approval to Re Castioni, in which the Court refused extradition because the crime of the fugitive concerned (in having shot a member of the Government while taking part in a revolutionary movement of the Canton of Ticinio) was considered to be political. The present case, however, concerned a man charged with forgery and, even if the

<sup>1. (1923) 1</sup> K. B. 24.

<sup>2. (1952) 1</sup> All E. R. 1060. 3. (1891) 1 Q. B. 149.

case had some political implications—into which the Court could not inquire—there was no reason to suppose that he would not receive a fair trial and it would be an 'impossible position for this Court to take up' and 'an insult to the Courts of India' to say that he would not.

Eisler's Case.—In the Eisler Extradition Case (1949), Gerhart Eisler, and then communist, convicted in America of some criminal offences, fled from New York to Poland. He was arrested by the British police officers and produced for trial before a Bow Street magistrate. The British magistrate discharged Eisler from custody on the ground that the offences for which Eisler had been convicted in America, viz., 'perjury' did not fall under the technical head of perjury in England. This case emphasizes the principle of double criminality, i.e., the crime must be an offence in both the States.

- 7. Haya de la Torre's Case.—In the Haya de la Torre's case¹ Victor Raul Haya de la Torre, a Peruvian national and a political leader accused of having instigated a military rebellion, was granted asylum by the Columbian Embassy at Lima (West Peru). The International Court of Justice observed that although the Hayana Convention expressly prescribed the surrender of common criminals to the local authorities, no obligation of the kind existed in regard to political offenders. It reiterated its view that asylum had been irregularly granted and that, although on that ground Peru was entitled to demand its termination, Columbia was not bound to surrender the refugee.
- 8. Kolczynski's Case.—In re Kolczynski and others² seven members of the crew of a Polish fishing trawler finding themselves under political supervision and fearing that they would be severely punished on account of their political opinions if they returned to Poland, placed the master and some members of the crew under restraint and brought the vessel to the nearest English port, where they were detained on September 22, 1954, under the Aliens Order, 1953. The Polish authorities in Warsaw asked for their extradition. The metropolitan magistrate, before whom extradition proceedings were held, found the applicants guilty of revolt on the high seas, an offence listed in Schedule 1 to the Extradition Act, 1870, and in the Schedule to the U. K.-Poland Extradition Treaty, 1932. On the applicants moving for writs of habeus corpus, the Queen's Bench Division held as follows:
  - (i) The effect of the Extradition Act, 1870, is to prevent a crime of a political character from coming within the purview of the Act. It is the duty of the magistrate to determine on the whole of the evidence whether the offence charged is an extraditable crime and whether it is of a political character; but this determination is subject to review by the High Court by way of habeas corpus proceedings.
  - ii) The political character of the offence may emerge either from the evidence in support of the request for extradition or from the evidence adduced in answer. The definition in Re Castioni of the term "offence of a political character" was not and was not intended to be exhaustive. The term, observed Cassels, J. must always be considered according to the circumstances existing at the time when they have to be considered. The present time is very different from 1890 when Castioni's case was decided. It was not then treason for a citizen to leave his country and start a fresh life in another. Countries were not regarded as enemy countries when no war was in

I. C. J Reports (1951). p. 71.
 (1955) I All E. R. 31.

progress.....The applicants in the present case revolted by the only means open to them. They committed an offence of a political character and if they were surrendered they would be punished as for a political crime.

In the result it was held that the applicants were excepted from surrender to the Polish State by virtue of S. (3) (1) of the Extradition Act, 1870, and writs of habeas corpus were issued.

## CHAPTER XXV

# PLACE OF THE INDIVIDUAL IN INTERNATIONAL LAW

Traditional view .- A lot of literature has grown round the controversy whether individuals are subjects of International Law. The orthodox positivist view-a product of the nineteenth century-has been that only States and not individuals are the subjects of International Law as International Law only regulates relations between States which alone can have international rights and duties. The individual, according to this view, has no juridical personality and he can have only rights and obligations with reference to his own state. Sir Frederic Smith observed that States alone enjoy a locus standi in the law of nations and that they are the only wearers of international personality." Oppenheim in consonance with this view maintained that since the law of nations is primarily a law between States, States are normally the only subjects of the law of nations and individuals are the ultimate objects of International Law. As to seeming divergence due to certain rights and duties bestowed on monarchs and other heads of States, diplomatic envoys, and even simple citizens, in conformity with International Law, he observes that foreign States granting these rights to foreign individuals do this by their municipal laws, and these rights are, therefore, not international rights, but rights derived from municipal laws in accordance with a duty imposed upon the States concerned by International Law. International Law is indeed the background of these rights, but such rights come into existence by municipal laws. Likewise, all duties which might necessarily have to be imposed upon individual human beings according to the Law of Nations are, on the traditional view, not international duties, but duties imposed by municipal law in accordance with a right granted to, or a duty imposed upon, the State concerned by International law.1 The above view of Oppenheim is strengthened by the fact that even the Statute of the International Court of Justice empowers only States to take action in international affairs. Article 34 expressly provides that only States may be parties in cases before the Court. It was observed by the Permanent Court of International Justice in the Serbian Loans that a dispute which was exclusively one between a State and the subjects of another State could not be brought before the International Court.

Professor L. C. Green observes that "in classical international law the individual was regarded as an object; that is to say, he enjoyed no rights and was burdened by no duties. By and large, it may be said that international law worked itself out upon the individual, using his home State for the purpose."3

Extreme view.—There is then the other extreme view that the State is only a fiction of the brain, but in the ultimate analysis it is the individuals

1. Oppenheim: International Law, Vol. 1, 8th Ed. p. 19.

A, 20-21, p. 17, Vol. I, p. 19.
 The Individual and his Status in International Law Prof. L. C. Green, Indiau journal of International Law, 1960-61, p. 415.

alone who are the subjects of International Law. This view finds ample support from the observations of Westlake who, while emphasizing the importance of the individuals, observes that "the duties and rights of the States are the duties and rights of the men who compose them."

According to Hans Kelsen, "like all law, International Law, too, is a regulation of human conduct. It is to men that the norms of International Law apply; it is against men that they provide sanctions .... If International Law lays down duties, responsibilities and rights...these duties, responsibilities, and rights can have only human conduct for content. For a duty which would not be the duty of a man to behave in a certain way would not be a legal duty; a responsibility which would not consist in a sanction executed by men and directed against men would not be legal responsibility."1

According to E. C. Stowell, an individual is the subject of International Law both in his capacity of a human being and as being a component part of Fundamentally, he observes, the law of nations is a law of individuals, enforced through the agency of the government of the communities into which mankind is apportioned.

Heffter is of the view that the fundamental rights inherent in human beings entitle individuals to be "immediate subjects of International Law."

According to P. M. Brown, "the most serious error committed by the defenders of International Law has been found in their parrotlike reaffirmation that it applies only between sovereign States."

The exponents of this view assert that the State is only an institution to safeguard and protect the rights of the individuals constituting it and that its personality is the sum total of the personalities of such individuals.

"The law of nations of previous centuries with its roots in natural law, both Christian and Greek, and in the jus gentium of the Romans, gave a primary place to the individual, for the very essence of natural law is a sense of moral justice, of right reason, which has no meaning except in terms of a heightened awareness of the worth of human personality."3

The antiquated doctrine that the individual cannot be a subject of rights and duties in international law, should be thrown overboard... In order to give any real significance, in theory and practice, to international human rights it is necessary to accept the principle that the individual can derive these fundamental rights directly from positive international law.3

Lauterpacht while revising Oppenheim's book on International Law observed that although primarily States are subjects of International Law, it is essential to recognise the limitations of this principle. meaning is that States only create International Law, that International Law is primarily concerned with the rights and duties of States and not with those of other persons; and that States only possess full procedural capacity before international tribunals. Further than this that principle does not go. In particular, when we say that International Law only regulates the conduct of States we must not forget that the conduct actually regulated is the conduct of human beings acting as the organ of the State.

Hans Kelsen: Principles of International Law, p. 97-

2. Ann Van Wynen Thomas: The Semantics of International Law. p. 26. 3. Pieter N. Drost, Human Rights as Legal Rights (Leiden . A. W. Sijthoff. 1951, 22 . 36

Lauterpacht1 refutes the view that States are the exclusive subjects of International Law. He observes: "The claim of the State to unqualified exclusiveness in the field of international relations was tolerable at a time when actuality and the interdependence of the interests of the individual cutting across national frontiers were less obvious than they are today. It is this latter fact which explains why the constant expansion of the periphery of individual rights-an enduring feature of legal development cannot stop short of the limits of the State. What is much more important, the recognition of the individual, by dint of the acknowledgment of his fundamental rights and freedoms, as the ultimate subject of International Law, as a challenge to the doctrine which in reserving that quality exclusively to the State tends to a personification of the States being distinct from the individuals who compose it, with all that such personification implies. That recognition brings to mind the fact that in the international as in the municipal sphere, the collective good is conditioned by the good of the individual human beings who comprise that collectivity. It denies, by cogent implication, that the corporate entity of the State is of a higher order than its component parts. It challenges the absolute moral superiority of groups, and in particular of the collective agency of the State which thus artificially personified is prone to and certainly capable of disregarding all moral restraints."

Further, the Declaration of Independence of the U.S.A. clearly lays down that governments exist by the consent of the governed, being the agents of the people, acting under their control and obedient to their injunctions. They derived their prerogatives from the people—the individual citizens whom they represent. The institution of the State as such owes its origin to the necessity of ensuring and preserving the freedom of the individuals, who are knit together and bound by cultural, racial and territorial ties.

States and Individuals subjects of International Law .- The correct view which has been gaining a considerable number of adherents is that States are no doubt subject of International Law but individuals may as well occupy the same position.

In the presence of these facts it would seem unreal to say that individuals are not in some degree subjects of International Law, at least in respect to the rules of substantive law. In respect to procedural law, while the individual must in general look to his State for the enforcement of his rights, there is the precedent of the minorities treaties conceived after the First World War to mark the tendency to create international machinery for the protection of fundamental rights.2 While the procedures for the protection of the rights assigned to the individual are as yet in large part a matter of domestic law, the obligations assumed by the parties under the existing treaties and resolutions are influenced by decisions of the commissions entrusted with their supervision, before which the individual may appear and state his case. The individual is clearly to that extent a subject of international law.8

According to Schwarzenberger, "It may be considered paradoxical that the individual, the basis both of national communities and of international society, should be merely an object of International Law. as the groups which, until now, hold the monopoly of admitting additional subjects to the realm of International Law chose to maintain this state affairs, this situation is bound to continue. It is mitigated in fact by the

3. Ibid , 1967, Indian Edition, p. 154.

International Law and Human Rights (1950 ed.), pp. 69-70.
 Fenwick, Charles G., International Law, 3rd Ed., p. 134.

diplomatic protection of nationals abroad by their home States and by multitude of treaties, like commercial or minorities treaties, which must directly concern individuals."

According to Anna Vann Wynen Thomas, "one of the major assumptions of the law of nations is that as the international society develops and becomes more advanced certain social interest of the whole community will have to intrude on what was previously the sole interest of a sovereign state, for the operation of any society depends on the integration and working together of all of its parts. It follows logically that new fields and new vistas are continually being opened up as current learning advances. Consequently even the humble individual human being, formerly thought to be subject only to the sovereignty of the State of which he is a member, can participate in the processes of developing International Law. Treaties banning slavery, the slave trade, and forced labour; for safeguarding health and preventing abuses injurious to it; for the protection of statelesss persons and refugees; treaties imposing duties of religious and political tolerance toward minorities; and agreements establishing most of the rules of modern warfare have all added to the moral foundation of International Law ... To the extent that sovereign States recognized by such treaties an international duty to treat mankind with the same respect with which they treated other members of the international community, to that vital extent the recognition of inalienable human rights and the recognition of the individual as a subject of International Law became synonymous.1

Russian view.—The above view, however, is not shared by the U.S.S.R. on account of their totalitarian attitude toward the individual and adopting altogether a different philosophy which gives an undue importance to the activities of the State and professes antagonism to the place of individuals in International Law. M. V. M. Koretsky of Russia in his capacity as jurist in United Nations International Law Commission unequivocally declared his country's dissociation with the concept of individual as subject of International Law. This was because communism starts with the negation of individualism, and the individual being nothing more than a component of a class loses his individuality in the legal sense of the term. According to this concept the individual exists for the sake of the State and not vice versal and he enjoys no legal protection against the State. He has no freedom for divergent social, political or religious opinions that might create a dual loyalty.

Treaty stipulations.—The treaties between nations were often negotiated to protect the rights of the individual. The Treaty of Berlin (1878) enjoined upon Bulgaria, Montenegro, Serbia, Rumania and Turkey to ensure religious freedom to their nationals. After the First World War the treaties with Poland, Gzechoslovakia, Rumania, Greece, Austria, Bulgaria, Hungary, the Serb Groat-Slovene State and Turkey guaranteed just and equal treatment for their racial, religious and linguistic minorities. Again in the Pairs freaties of 1947 entered into between Italy, Rumania, and the other exceeding satellite States, provisions were made for protecting human rights. Such treaties conferred rights directly upon individuals.

It was authoritatively laid down by the Permanent Court of International Justice in the Jurisdiction of the Court of Danzig that the very object of an international agreement, according to the intention of the contracting parties,

The Semantics of International Law, p. 27.
 (1928) P. C. I. J. Series B. No. 15.

may be the adoption by the parties of some definite rule creating individual rights and obligations and enforceable by the national Courts.

Nuremberg Trial.-The International Military Tribunal at Nuremberg had to consider the submissions made by the accused that International Law was concerned with the actions of sovereign States, and provided no punishment for individuals; and further that where the act in question was an act of State those who carried it out were not personally responsible, but were protected by the doctrine of the sovereignty of the State. The Tribunal rejected both these submissions and observed : That International Law imposes duties and liabilities upon individuals as well as upon States has long been recognized. In the case of Ex parte Quirin 1 Chief Justice Stone of the U. S. Supreme Court said :

"From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals.

".....individuals can be punished for violations of International Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced.

"On the other hand, the very essence of the Charter is that individuals have international duties which transcend the national obligations obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence in International Law."

The various War Crimes Tribunals as also the International Military Tribunal at Nuremberg have recognized crimes against humanity as punishable offences under International Law resulting in the prosecution of individuals for such offences. Article 6 of the Charter of the International Military Tribunal empowered the Tribunal, established for the trial and punishment of the major war criminals of the European Axis countries, to try and punish persons who, acting as members of organizations, committed any of the crimes detailed there within the jurisdiction of the Tribunal and fastened individual responsibility. In effect Art. 6 imposed criminal responsibility in International

Law on a physical person and not a State.

Professor Green is, however, of the view that the Nuremberg Tribunal in its judgment on the major Nazi War Criminals expressed itself in a form that was fully consistent with the traditional view of international law, ratha than in conformity with the emotional view then current. The Tribun expressly declared that "to constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any cerime within the jurisdiction of the Tribunal. While the judgment gives a very full account of the abominable manner in which the German Government treated-or ill-treated-large numbers of its nationals, none of the accused was found guilty of ill-treating Germans, unless it could be shown that such ill-treatment was part and parcel of one of the war crimes, such as the waging of aggressive war, over which the Tribunal had jurisdiction. Even in such cases as the Doctors' trial and the Trial of Field Marshal Miltch3 it was not

(1942) 317 U. S. 1.
 Annual Digest 1947

Annual Digest 1947, p. 96.
 Appleman, Military Tribunals and International Crimes, 1954, p. 139.

customary International Law which enabled the United States Military Tribunal concerned to adjudge the accused guilty of offences against German citizens, committed independently of the waging of aggressive war. By virtue of the unconditional surrender of Germany and the operation of Control Council Law No. 10, this Tribunal was to all intents and purposes a German municipal tribunal, giving effect to the municipal law postulated by the victors as the effective sovereign of Germany.

Genocide Convention.—The Convention on the Prevention and Punishment of the Crime of Genocide, approved by the U.N. General Assembly on December 9, 1948, further attaches direct responsibility to individuals by making provisions for punishing persons committing genocide, whether they are constitutionally responsible rulers, public officials or private individuals (Article IV). It is laid down that genocide shall not be considered as a political crime for the purposes of extradition. Under the Convention the States agreed that genocide and the conspiracy to commit genocide should be punishable on trial by national courts or by an international criminal court. But here again no provision has been made for the members of the group that is being attacked to institute at y proceedings on their own behalf.

Atlantic Charter.—The Atlantic Charter (1941) gave expression to the four basic principles of human freedom: freedom from fear, freedom from want, freedom of speech and freedom of worship. These principles made a departure from the concept of International Law which considered relations between States with absolute sovereignty as its main theme, and created a new person in International Law—the human being. It became internationally established that "the State is an instrument to serve the people and not an end for man to serve."

United Nations. - The preamble to the Charter of the United Nations has shifted the emphasis from "The High Contracting Parties" of the League of Nations to the "Peoples of the United Nations" thereby reaffirming faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. It is the duty of the founders of the U. N. to resist any attempt to thwart the high ambitions as embodied in the doctrine of fundamental human rights The complacent attitude of the U. N. in not taking appropriate action against the Union of South Africa for violating the resolutions of the U. N., which condemned her policy of racial discrimination systematically pursued in respect of peoples of Indian origin in South Africa, does not redound to the credit of the U. N. The racial arrogance and domination has been one of the causes of the last world war, and yet racialism in its most naked form is thriving in South Africa, crushing under its heels the vast majority of the population there. The race problem is one of the toughest problems, which, if not carefully handled, might wreck the concept of the United Nations.

In spite of these imperfections, as indicated above, the United Nations lays great emphasis on the development of human personality and the preservation of the fundamental human rights of the individual. The United Nations Educational, Scientific, and Cultural Organization, the World Health Organization, International Labour Organization, Food and Agriculture Organization of the United Nations, the International Bank for Reconstruction and Development, the International Monetary Fund, the United Nations International Children's Emergency Fund, etc., are all designed to secure economic, social and cultural unity of mankind.

<sup>1.</sup> Jorge Americano: The New Foundation of International Law, p. 13

Right to petition an international authority.-The Declaration of Human Rights discussed hereafter does not provide possibilities for the individual to petition an international authority in case of an alleged violation of the Covenant's provision s. Nevertheless, large numbers of petitions continue to pour in from individuals and from associations of individuals to the U. N. Secretariat. Professor Lauterpacht is definite in his view that the right of an individual or a group of individuals to ask U. N. for action on violation of a human right arises out of the Charter itself. According to him, the provision of Article 2, paragraph 7, of the Charter, which excludes U. N. intervention in matters which are "essentially within the domestic jurisdiction of any State, is no bar to any action taken on the basis of a complaint." "In excluding matters which are essential within the domestic jurisdiction of any State," he observes, "they did not include within that exception matters which are the subject of international obligations, which include the observance of and respect for human rights and freedoms." Moreover, according to him, a mere examination of a petition from an individual and, consequent on such examination, sending an invitation to the State concerned to give its comments on the matter or sending a recommendation, adopted by U. N., are not interventions in the legal sense of the word.

Petitions under the Trusteeship System.—The Charter provides for the right to petition the U. N. in respect of territories under trusteeship. The right has been embodied in all trusteeship agreements.

The right to petition for Stateless Persons.—The U. N. International Law Commission adopted during the fifth session on August 7, 1953, two provisional texts of conventions dealing with statelessness. The Commission came to the conclusion that a tribunal for considering complaints be established within the framework of U. N., which should be accessible to individuals acting through an agency, to be established within the framework of U. N. It was considered necessary to make provision for an international agency to act on behalf of persons threatened with statelessness. It would be the task of the agency to act on behalf of the nationals concerned before governments, prior to initiation of proceedings before the tribunal, with a view to disposing of the complaints by appropriate procedures of inquiry and representation made to Governments.

Universal Declaration of Human Rights.—The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on December 10, 1948. It sums up the civil, political and religious liberties men have struggled for so long. It also contains new economic and social rights which are only slowly being recognized to-day.

The preamble to the Declaration stresses the "dignity and worth of the human person". The first two articles emphasize that these rights and freedoms apply to everyone, everywhere. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.

Articles 3 to 15 restate the older recognized rights of life, liberty and the security of person, to recognition everywhere as a person before the law and to equal protection of the law. No one is to be subjected to arbitrary arrest, detention or exile. The Declaration outlaws slavery, torture and cruel, inhuman or degrading punishments, arbitrary interference with home, family,

or correspondence. The right to a nationality is recognised and the right to seek asylum from persecution in other countries has been guaranteed.

Article 16 protects the right of men and women of full age to have the right to marry and to found a family without any limitation due to race, nationality or religion. Article 17 guarantees everyone's right to own property and provides that no one shall be arbitrarily deprived of his property. Articles 18 and 19 provide for one's right to freedom of thought, conscience and religion as also to freedom of opinion and expression. Articles 20 and 21 lay down that everyone has the right to freedom of peaceful assembly and association and to take part in the government of his country as also equal access to public service in his country.

Articles 22 to 26 proclaim the economic and social rights. These include the right to work, to free choice of employment, to equal pay for equal work, to rest and leisure and to protection against unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond one's control. The Declaration further recognises everyone's right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing and medical care and necessary social services. Article 26 guarantees the right to education, which is free at least in the elementary and fundamental stages and is to be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.

Article 26 provides that everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realised. This implies that these rights are only attainable under a suitable form of government and in an atmosphere of co-operation among

The next article imposes corresponding duties to the community in which alone the free and full development of one's personality is possible. The rights of individuals have to be subordinated to-and only to-the "just requirements of morality, public order and the general welfare." It further stipulates that these rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Finally, Article 30 provides that nothing in the Declaration may be interpreted as implying for any State, group or indvidual any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth above.1

Importance of the Declaration -The Declaration sets a new international standard. For the first time in history the representatives of most governments on earth have agreed that certain rights belong not to any one nation or group but to every human being as a human being. The United Nations have proclaimed that people have these rights not because they are Swedes or Arabs, Christians or Buddhists, Eskimos, Hottentots or South Sea Islanders, but because they are human beings. What the Universal Declaration really says is that each person should be considered on his or her merits and all deserve a chance to live a full and happy life.2

1. Cf. Our Rights as Human Being: A Discussion Guide on the Universal Declaration of Human Rights: U. N. Publication. 2. Cf. U. N. Publication supra.

Legal aspect of the Instrument.-Although the members of the United Nations were unanimous in stressing the importance of the Declaration as a declaration of rights, they were equally clear in their minds that it did not provide any machinery for its enforcement; nor did the Declaration impose upon the members a legal obligation to respect the human rights and fundamental freedoms which it envisaged. It could at best be "a first step in a great revolutionary progress." The representative of the United States clearly confessed that the Declaration was not a legal document and possessed no legally binding force. He observed: "In giving our approval to the Declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty, it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedom to be stamped with the approval of the General Assembly by a formal vote of its members, and to serve as a common standard of achievement for all nations," The Indian delegate opined that although the Declaration was not legally, binding, it would have a certain amount of force and might help to dispel pessimism and disillusionment and to relieve the tension of the present world situation.

Professor Lauterpacht¹ observes that "the student of International Law may find it difficult to subscribe to the view that it is a rule of customary International Law that, to mention some of the least controversial pronouncements of the declaration, 'everyone has the right to life, liberty and security of person' (Art. 3 of the Declaration); or that 'no one shall be held in slavery or servitude' (Art. 4; or that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (Art. 5). Prior to the Charter, apart from the precarious doctrine of humanitarian intervention, International Law considered these matters to be within the exclusive domestic jurisdiction of the State." The Belgian representative Professor Dehousse concluded that although the document would have an incontestable legal value, it would not have any obligatory value strictly so-called; but it would place an obligation on member-States to consider the action which should be taken on that recommendation of the General Assembly.

Indirect Legal Authority of the Declaration.—The preamble of the Declaration embodies a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance. Professor Lauterpacht observes that the Declaration gives expression to what, in the fullness of time, ought to become principles of law generally recognized and acted upon by States members of the United Nations.

Professor Lauterpacht, however, repels the view, that although the Declaration in itself may not be a legal document involving legal obligations, it is of legal value inasmuch as it contains an authoritative interpretation of the 'human rights and of international freedoms which do constitute an obligation, however imperfect, binding upon the members of the United Nations." He remarks that "to say, therefore, that a document is not legally binding and that it embodies, nevertheless, an authoritative interpretation of a legally binding instrument is to make a statement the first part of which contradicts the

<sup>1.</sup> Professor H. Lauterpacht; Article in the British Year Book of International law, 1948.

second." He also does not share the view that the Declaration may be of importance for the interpretation of the Charter as a formulation, in this field, of the general principles of law recognized by civilized nations, for the Declaration does not purport to embody what civilized nations generally recognize as law. In his view the Declaration cannot also be regarded as a recommendation of the General Assembly, for the operative part of the Declaration only 'proclaims' but does not recommend to members of the United Nations to observe its principles.

Moral force of the Declaration.—The Belgian delegate remarked that in this Declaration, voted by the virtual unanimity of all the members of the United Nations, there is a moral value and authority which is without precedent in the history of the world, and there is the beginning of a system of International Law. The man in the street claiming certain rights would not simply be an isolated voice crying in the wilderness; it will be a voice upheld by all the peoples of the world represented at this Assembly.

Before the General Assembly the British representative observed that "this is, indeed, an historic occasion because, great as are those documents, never before have so many nations joined together to agree upon what they consider to be the basic and fundamental rights and freedoms of the individual."

Professor Lauterpacht very pertinently observes that "the moral authority and influence of an international pronouncement of this nature must be in direct proportion to the degree of sacrifice of the sovereignty of States which it involves. According to him "the moral authority of a pronouncement of this kind cannot be created by affirmations claiming for it such authority." The Scrupulously avoided laying down the duties of individuals, but it has individual can be ensured "unless as a counterpart" the duties of the State are clearly defined. There are no rights unless accompanied by remedies.

The moral authority envisaged by the declaration is, however, further impaired, again to quote the words of Professor Lauterpacht, "by the fact that some of its crucial provisions—while clearly not intended to imply a legal obligation—are couched in language which is calculated to mislead and which is vividly reminiscent of international instruments in which an ingenious and deceptive form of words serves the purpose of concealing the determination of States to retain full freedom of action."

Two Covenants of the Declaration of Human Rights.—The rights embodied in the Universal Declaration of Human Rights have been set forth in two covenants—the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights—which were adopted by the General Assembly on December 16, 1966. The two Covenants ensure equal right of men and women to the enjoyment of all therein.

The General Assembly is planning a special programme in 1973 to observe the 25th anniversary of the Universal Declaration of Human Rights.

On November 20, 1959, the General Assembly of the United Nations of the document was reflected in the preamble, which said, in part, "mankind owes to the child the best it has to give."

At its twentyseventh (1972) session, the Assembly adopted a Declaration

on the Rights of Mentally Retarded Persons--stating, for example, meir rights to economic security and a decent standard of living.

In other measures relating to social matters, the Assembly urged States to provide severe penaltics for drug traffickers; favoured progressive restriction of offences for which capital punishment may be imposed "with a view to the desirability of abolishing this punishment in all countries;" recommended that the Standard Minimum Rules for the Treatment of Prisoners be effectively implemented; called on parties to armed conflicts to observe humanitarian rules laid down in relevant Hague and Geneva conventions; and stated the need for a convention to provide protection for journalists engaged in dangerous missions in areas of armed conflict.

The Charter of the United Nations reaffirms its faith in promoting and encouraging respect for human rights without distinction as to race, sex, language or religion, but South Africa continues to adhere to the policy of racial discrimination in spite of repeated resolutions passed by the General Assembly. The hardarities committed in East Bengal by the Government of Pakistan in the name of a united Pakistan following a civil war towards the end of March 1971 were unprecedented and in spite of the loud proclamations of the United Nations it did not take cognizance of the serious situation until the breaking out of war between India and Pakistan in December 1971. The brutal and unprovoked killings by West Pakistani forces and barbarities were in violation of the provisions of the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Grime of Genocide, 1948.

The Universal Declaration of Human Rights although having very laudable of jects suffers from the inherent weakness of lack of effective support from the members of the United Nations.

European Convention for the Protection of Human Rights.—With a view to giving legal validity to the Universal Declaration of Human Rights, 1948, the member-States of the Council of Europe signed on a regional basis on the 4th November, 1950, at Rome the European Convention for the Protection of Human Rights and Fundamental Freedoms. This was a step in the direction of the realization of the ideals enshrined in the Universal Declaration of Human Rights by legal commitments made by Governments of 15 States. Two new optional clauses have been inserted in the convention, viz., right of an individual to have access to an international organization for the protection of his rights and the setting up of an international judicial organ competent to adjudicate on and above the national governments. These clauses though optional open a new vista of life towards the rights of an individual for the protection of his human personality "against all tyrannics and against all forms of totalitarianism."

Out of the 18 members of the Council of Europe all except two (France and Switzerland) are now parties to the Convention. In January 1966 the United Kingdom accepted the two optional clauses in the Convention for a period of three years. Eleven of the contracting parties have recognised the right of individual petition as also the compulsory jurisdiction of the Court.

In September 1965 the new Human Rights building was officially inaugurated in Strasbourg. The Commission and the Court of Human Rights and relevant departments of the Secretariat General of the Council of Europe thus have their own premises where these international organs for protection of human rights are housed.

History of the Convention .- Article 1 of the Statute of the Council of Europe, signed in London on May 5, 1949, aimed to achieve a greater unity between the members of the Council of Europe for the purpose of safeguarding and realising the ideals and principles which were their common heritage and to facilitate their economic and social progress through the organs of the Council by discussion of questions of com non concern a 11 by agreements and common action in economic, social, cultural, scientific, legal and administrative matters, and in the maintenance and further realisation of human rights and fundamental freedoms. The Consultative Assembly is the deliberative organ of the Council, having no powers of decision but entitled to make recommendations to the Committee of Ministers, which is the executive organ of the Council. The Committee of Ministers appointed a Committee of governmental legal experts to prepare a draft Convention, which met in Strasbourg in February and March, 1950. It submitted its report to the Committee of Ministers with alternative texts. A Committee of Senior Officials was subsequently constituted, which prepared a draft Convention incorporating the texts submitted by the legal experts. After consideration by the Consultative Committee and the Committee of Ministers, the Convention was finally signed on November 4. 1950.

Analysis of the Convention.—Article 11 of the Convention envisages everyone's right of freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests. Articles 5 and 6 of the Convention deal exhaustively with arbitrary arrests, detention or exile and the right to a fair trial. They lay down the salutary principles of presumption of innocence until guilt is proved; the public nature of the hearing, including admission of the press and the circumstances in which it may be excluded; adequate time and facilities for the defence, free legal assistance, production, and examination of witnesses, etc.

The European Commission of Human Rights.—The Convention provides for a European Commission as an impartial international organ to which complaints could be made on the failure of any member-State to secure to anyone within its jurisdiction the rights and freedoms defined in the Convention. The Commission will consist of fifteen members. There shall also be a sub-commission of seven members for achieving a friendly settlement. On failure to arrive at a friendly settlement the Commission as a whole will draw up a report and state its opinion on breach of the obligations by the State concerned. Under Article 31 the Commission will forward its report to the Committee of Ministers by making necessary proposals. The High Contracting Parties have undertaken to regard as binding on them any decision of the Committee of Ministers in this respect taken by a two-thirds majority of the members entitled to sit on the Committee.

Right of Individual Petition.—Any alleged breach of the provisions of the Convention by a High Contracting Party can only be reported by a member-State, unless the Government concerned recognized the competence of the Commission to receive petitions from individuals. Article 25 provides that six declarations of acceptance are necessary before the right of individual petition can be exercised.

It was difficult to obtain unanimity with regard to the right of the individual to petition to the Commission directly and therefore a compromise formula as mentioned above was reached. The is, however, not in consonance with the spirit of the Convention for, as Robertson observes in a very illuminat

<sup>1.</sup> A. H. Robertson : British Year Book of International Law 1950, p. 154.

ing article, "when the object of the agreement is to protect not States but individuals, the real party in interest, if a breach of the agreement occurs, is the individual whose rights have been denied. It is, therefore, this individual who stands in need of a remedy, and the remedy he needs is a right of appeal to a tribunal which is competent to call the offending party to account."

The Commission continues to receive about 300 individual applications a year.

The European Court of Human Rights.—There is a provision for the creation of European Court of Human Rights, and the Court when created would have jurisdiction in respect of those States which have expressly accepted its compulsory jurisdiction. Article 56 of the Convention provides that the minimum number of eight declarations accepting its compulsory jurisdiction must be made before a case can be brought before the Court. On necessary declarations having been made, the Court started functioning. The Commission has also referred several cases to the Court.

Conclusion —Robertson while summing up observes that "the European Convention on Human Rights is an imperfect document, but it represents a big step forward. It constitutes a great advance on the Universal Declaration of Human Rights of the United Nations since the latter amount ed in the last analysis to nothing more than an expression of intentions, whereas the European Convention contains specific legal commitments which have been accepted by fifteen governments. The most important innovations which it was hoped that the European Convention would contain were two: the granting to individuals whose rights are denied of direct access to an international organ capable of protecting them; and the institution of a judicial body on the international plane competent to sit in judgment on national governments. Unfortunately, it was not politically possible at this juncture to obtain unanimous agreement on the acceptance of these two provisions. Each of them remains optional in the sense that it is not a necessary consequence of signature of the Convention, but depends on an express supplementary declaration by the States concerned"

International Human Rights Intruments<sup>2</sup>.—The International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force in January 1969, is the latest in a series of international human rights instruments which began with the proclamation by the General Assembly in 1948 of the Universal Declaration Human Rights.

A unique feature of the Convention is the fact that it is the first United Nations human rights instrument to provide machinery for its implementation. An 18-member Committee of Experts, elected by the parties to the Convention, met for the first time in January 1970. Its task is to oversee implementation of the Convention by receiving reports which all parties must submit regularly on measures they have taken to carry out their commitments under it. Using information from these reports and other sources, the Committee will make general recommendations to the General Assembly. Conciliation commissions to settle disputes arising out of differing interpretations of the Convention are also provided for.

The General Assembly in 1969 expressed "grave concern" at reports of human rights violations in Israel-occupied territories, condemned policies of collective punishment and the deportation of the inhabitants of those

A. H. Robertson: British Year Book of International Law, 1950, 162
 Cf. United Nations Publication, NXV Anniversary of the Organization.

territories, and urgently called on Israel "to desist forthwith from its reported repressive practices and policies towards the civilian population in the occupied territories." Ceylon, Somalia and Yugoslavia were appointed to make up a Committee to investigate Israeli practices affecting the human rights of the population of the occupied territories.

The General Assembly designated 1971 as International Year for Action to combat racism and racial discrimination.

Again in 1969, the Assembly condemned South Africa and Portugal for their "inhuman and degrading treatment and torture" of political prisoners and freedom fighters; called on them to observe the terms of the Geneva Convention on the Treatment of Prisoners of War and called on Portugal to observe the Geneva Convention on the Protection of Civilians in time of War. The Assembly also called on the United Kingdom to reconsider its "deplorable refusal" to intervene in Southern Rhodesia by force and thus restore human rights there. It requested the Secretary-General to establish a register of persons subjected to imprisonment, detention, banishment and other restrictions in southern Africa for their opposition to aprtheid and racial discrimination.

In addition, the Assembly renewed its strong condemnation of racism, nazism, apartheid and all other totalitarian ideologies and practices, and called on States to take immediate measures to prohibit Nazi and racist organizations and groups. It also called on all States and organizations to set aside a day each year in memory of the victims of such ideologies and recommended that Governments promote the publication and dissemination of material on United Nations efforts to combat Nazism and on the danger of the present revival of Nazism in a number of countries.

On November 13, 1970, a coalition of Asian, African and Soviet bloc countries succeeded in barring the General Assembly's approval of the credentials of the South African delegation. The action, intended as a protest against South Africa's apartheid policies was pushed through despite an opinion by the Assembly President that it would not affect the right of the delegation to take part in Assembly proceedings.

While the United Nations Charter, the Universal Declaration of Human Rights and the International Covenants enunciate the basic United Nations concepts of human rights, other instruments, such as the very important International Convention on the Elimination of All Forms of Racial Discrimination, contain more specific provisions in various fields of concern to the Organization. The Sul-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights, the Commission on the Status of Women, the Economic and Social Council and the General Assembly through its Third Committee, each within the area of its responsibilities, endeavour to complete and to improve the system as needs arise. The adoption by the General Assembly at its twenty-third session of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity deserves special mention.

Nationality.—When an individual is injured in a foreign State he has his remedy by the laws and tribunals of such foreign State. If, however, he fails to secure full redress, his remedy lies through the State to which he owes allegiance or of which he is a national, and such State may proceed to obtain redress by representations, remonstrances or other acts: De Huber v. The Queen of Portugal. It is, therefore, essential for him that he must be a national of a

State. Nationality, observes Hyde, is the relationship between a State and an individual which is such that the former may with reason regard the latter as owing allegiance to itself.

The Universal Declaration of Human Rights provides that everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality (Article 15). In order to obtain nationality of a particular State an individual has to fulfil the requisite qualifications such as his identification with a particular community through ties of birthplace, blood, or residence."

The Convention on Certain Questions Relating to the Conflict of Nationality Laws, signed at The Hague in April 1930, clearly postulates that it is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality (Art. 1).

Rights and Duties of Aliens.—Every nation has an inherent right by virtue of its sovereignty to forbid the entrance of foreigners within its dominions, or to admit them upon conditions, save when treaty obligations provide to the contrary. In practice, however, due to intercourse and interdependence every State makes its own laws to regulate the admission of aliens in its territory. A State may refuse admission of aliens if they are likely to compete with its nationals. In view of such considerations immigration laws are found on the statute book of different countries. Likewise a State may deport from its territory aliens whose presence is considered undesirable, it being an incident of sovereignty.

When an alien enters the territory of a State he takes upon himself the consequence of the State laws in the same way as the citizen of the State. If he takes up permanent residence in that State he is not exempt from taxes and other burdens that might be imposed on him by the laws of that country. It is the duty of the foreign State to offer a fair trial to an alien and to portect him against assault on his person and property. He cannot be forced to do military service without his native country's consent. On the other hand, the home State may recall its citizens from any corner of the earth for the purpose of rendering military service. An alien does not altogether lose his right to protection from his native country, but such intercession may not always be reasonable and proper.

A person leaves his State on the authority of a passport, which is a document issued in the name of the sovereign to a named individual, intended to be presented to the governments of foreign nations and to be used for the individual's protection as a subject of a particular State in foreign countries. It serves as a voucher and means of identification. By the possession of that document such a person is enabled to obtain in a foreign country the protection extended to subjects of his country. It was observed in Joyce v. Director of Public Prosecutions<sup>2</sup> that the Crown in issuing a passport assumes an onerous burden and the holder of the passport is acquiring substantial privileges. On the authority of Oppenheim it was observed that by a universally recognised customary rule of the law of nations every state holds the rights of protection over its nationals abroad. Armed with that document the holder may demand from the State's representatives alroad and from the officials of foreign govern-

Jessup : A Modern Law of Nations, p. 72.
 (1946) A. C. 347.

ments that he be treated as a British subject, and even in the territory of a hostile State may claim the intervention of the protecting power.

Professor L. C. Green observes that "the minimum standard of International Law in respect of the treatment of aliens does not operate to give the alien any rights which he can exercise himself. Any infringement of this minimum standard will remain uncorrected unless the State of which the injured alien is a national decides to take the matter up with the offending State. If the alien happens to be stateless, there is, in the absence of any treaty giving the parties to the treaty the right to protest against the ill-treatment of stateless persons, no State to whom the injured individual can turn for protection, or able in law to act on his behalf on its own initiative.".

Whether freedom of the Seas belongs to States or to individuals. -The high seas are no doubt open to the traffic of all men. The case of the motor vessel Asya is illustrative. She was sighted by a British destroyer on March 27, 1946, in the Mediterranean about 100 miles south-west of Jaffa, without flying any flag and later on hoisting a Turkish flag and then the Zionist flag, and brought into Haifa, where it was discovered that none of the 733 passengers on board had any passport or travel document or visa authorising them to enter Palestine. Condemnation proceedings were started in the Palestine courts in accordance with the Immigration Ordinance, 194 , as amended by Defence Regulations. It was contended on behalf of the owner of Asya that the high seas were open to all and that accordingly his ship was immune from seizure thereon, but the court holding the view that the freedom of the seas, like any other right or freedom under International Law, belonged to States and not to individuals, ordered condemnation of the vessel. The decision was approved by the Judicial Committee of the Privy Council in Naim Molvan, Owner of Motor Vessel Asya v. Attorney General for Palestine.2 It was observed that the proposition that the Asya, under the shield of the doctrine of "the freedom of the open sea," was entitled, whatever her mission might be, to sail the open sea off the coast of Palestine, or that any such right, unqualified by place or circumstance, was established by International Law, could not be assented to. In any case, no question of comity or of any Lreach of International Law could arise if there was no State under whose flag a vessel sailed and in the present case the Asya, having no usual ship's papers which would serve to identify her, flying the Turkish flag, to which there was no evidence that she had a right, hauling it down on the arrival of the boarding party and later hoisting a flag which was not the flag of any State in being, could not claim the pretection of any State nor could any State claim that any principle of International Law was broken by her seizure. The statement in Oppenheim's International Law,3 that "in the interest of order on the open sea, a vessel not sailing under the maritime ilag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State" was also approved. This extension of the ineligibility of stateless persons to international protection, to stateless ships engaged upon acts of piracy, therefore, marks a landmark in the development of International Law,

Individuals and International Treaties.—In international treaties the contracting parties are the States and in that respect the individual has no apparent importance. But the ultimate beneficiary even in such cases is the individual, though the enforceability of his rights vests in the agency of the State. The enforceability of his rights vesting in the State should not,

Indian Journal of International Law, 1960-61, p. 416.
 1948 A. C. 351.

<sup>3.</sup> Oppenheim's International Law, 6th Ed., Vol. 1, p. 546.

however, make a material difference in the position of the individual for his rights are sufficiently protected, although indirectly, in international instruments.

Claims of individuals.—It was observed by the Permanent Court of International Justice in the Mavronmatis Concessions, which was a dispute originally between a private person M. Mavronmatis and Great Britain and subsequently, when the Greek Government took up the case, between two States that by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of International Law. In subsequent decisions it was held that the injured individual is merely the peg on which the State hangs its claims.

In the case of Ker. v. Illionis<sup>2</sup> the United States Supreme Court held that a person kidnapped in another country and brought before an American Court was rightly under the jurisdiction of that Court and only the country from which he had been kidnapped could enter a caveat. A similar view was taken by Lord Goddard, C. J., in Ex parte Elliott<sup>3</sup> where it was held that if a person is arrested abroad and is brought before a Court in England charged with an offence which that Court has jurisdiction to hear, the Court has no power to go into the question, once that person is in lawful custody in that country, of the circumstances in which he may have been brought there, but the Court has jurisdiction to try him for the offence in question. The same principle has been applied by Israel to Eichmann.

Extradition.—Where a person who has committed an offence in one country escapes to another, mutual interest of States for the maintenance of law and order and the administration of justice demands that nations should co-operate with one another in surrendering fugitive criminals to the State in which the crime was committed. The universal practice of nations, however, is to surrender fugitive offenders only in consequence of a treaty with the country which demands them. The treaties invariably contain a clause that political offences are not extraditable.

It is true that individuals have no rights under extradition treaties, except for the principle of non-extradition of political offenders, which has assumed the character of a rule of International Law, so that a political offender can place reliance on it before the courts of the prosecuting State.

Right of Asylum.—According to Starke, asylum is a shelter which is more than merely a temporary refuge and a degree of active protection on the part of the authorities in control of the territory of asylum. It is a common feature in the political life of nations that certain individuals obliged to leave their country on account of their political leanings seek refuge in foreign territory. Such individuals seek and get asylum in outside countries on account of the territorial supremacy of those States.

Asylum may be territorial—granted by a State on its territory—or extraterritorial—granted by the legations to refugees from the authorities of the territorial State. The former is an incident of territorial sovereignty and the latter a derogation from the sovereignty of the territorial State. The latter is granted only on considerations of humanity.

Series A, No. 2, p. 12.
 (1886) 119 U. S. 436.

4. Starke, J. G Op. cit., p. 296

<sup>3.</sup> R. v. O./C. Depot Battalion, R. A. S. C., Colchester, Ex parte Elliott (1949)
All E. R. 373.

At the end of the First World War when the Supreme Council, representing the Allied and Associated Powers, demanded from Holland the surrender of William Hohenzollern, the former Emperor of Germany, for being put on trial, the Dutch Government refused to accede to the request and observed that the age-long tradition of Holland always made that country a ground of refuge for the vanquished in international conflict.

Recognition of the Right of Asylum.—"Treaties have often expressly forbidden the use of consular offices as places of asylum, and Article 19 of the Havana Convention on Consuls (1928) provided that consuls were obliged to deliver upon the simple request of the local authorities, persons accused or condemned for crime who might have sought refuge in the consulate, although the Havana Convention on Asylum (1928) was conspicuous by its omission to make any reference to asylum in consulates."

There is no private right recognised in International Law as to the right of asylum. The fugitive who manages to get over the border into some other country is not thereby by International Law entitled to claim to stay there. It is perfectly competent for the country receiving the criminal, whether there is an extradition treaty or not, to hand the criminal over if the country thinks that it will be fulfilling its duty to the world or if its conceptions of public policy require or justify it to do so.

Starke also shares the view that in case of territorial asylum even the fugitive has no enforceable right in International Law to enjoy asylum, either by grant from the State of refuge, or by acquiescence as against the pursuing State. The only international legal right involved is that of the State of refuge itself to grant asylum. Lauterpacht has, however, suggested that there is such an individual right because the fugitive is not usually surrendered, in the absence of an extradition treaty, and because if his offence is political, he is not generally subject to extradition.

As regards extra-territorial asylum, modern International Law does not grant any general right to a legation to grant asylum in its premises. Such grant of asylum is permissible as a temporary measure in a legation to individual mobbed by crowd or in peril on account of other disorder.

In the Columbian-Peruvian Asylam Case (1. C. J. Reports 1950, 266) the International Court of Justice observed that although the Hayana Convention expressly prescribed the surrender of common criminals to local authorities, no obligation of the kind existed in regard to political offenders. The Court, while confirming that asylum had been irregularly granted and that on this ground Peru was entitled to demand its termination, observed that Columbia was not bound to surrender the refugee.

It is, however, clear that International Law as observed in the practice and usages of States has not admitted a right of individual to asylum.

Pirates and War Criminals.—A State has jurisdiction over all pirates seized by its vessels. It is a crime in International Law as it is an offence against the whole body of civilised States and is not directed against any State to try such individuals for offences committed, without the authority of a State, upon the high seas. The law of war also permits punishment for According to Professor L. C. Green, far from International Law giving the pirates and the offender breaking the laws of war "any rights—unless it be the right to trial, and a drum-head court martial would suffice—it authorises a

State which would not normally be able to exercise jurisdiction over the accused to try for the alleged offences. Not only does International Law not grant the accused any subjective rights, it reduces the right he would normally have not to be tried by those seeking to judge him."

Individuals as subjects of International Law .- Professor Green further observes: "Those who support the view that the individual possesses personality in International Law frequently support their view by reference to the practice of the mixed Arbitral Tribunals established after the First World War, or to the International protection of minorities, or to the sphere of activity of the International Labour Organization. What they tend to overlook is that, in each of these cases, any rights that may be said to belong to the individual have been created by treaty; that, normally speaking, such individual rights can only be invoked by a State which is a party to the treaty in question-as may be illustrated by the decision of the Permanent Court of International Justice in the Danzig Railway Officials case and that what has apparently been granted to the individual under a treaty may just as easily be taken away from him by virtue of another treaty between the same parties, or by the parties allowing the treaties to fall into desuctude-as in the case of the Minorities Treaties."

Professor Green is, rightly therefore, of the view that "at present, despite all the idealism embodied in the Charter of the United Nations and the quantity of literature that has been produced to prove the international legal character of the rights of man, there appears to be little doubt that the individual has still a long furrow to plough before he receives any recognition of his status under International Law, apart from that which some individuals enjoy as a result of certain bilateral or regional treaties."

## CHAPTER XXVI

# DIPLOMATIC AGENTS

Diplomatic Agents.—Diplomatic Agents are ambassadors residing in a foreign country as representatives of the States by whom they are despatched. In a broader sense, an ambassador represents not merely one government to another government but even one nation to another nation so that they may understand each other. Lawrence says that the introduction of the practice of sending permanent ambassadors to reside at foreign courts is due more to statecraft than to utility. This view of Lawrence finds support from the classical definition of ambassador by Sir Henry Wotton, a British diplomat of the seventeenth century, that he is an honest person who is sent to lie abroad for the good of his country.

The word 'diplomacy' is derived from the Greek word 'diploma' meaning a letter folded double—a document; a writing conferring some honour or privilege. Diplomacy is the art of negotiation, especially of treaties between States, and involves the drawing up of documents in a negotiable form. It is the art of intercourse of nations with each other.

1. 1928 Series B/15.

Origin of the institution of diplomatic representation.-The institution of permanent diplomatic missions is an offspring of modern civilization. In the middle Ages negotiations between States were scarce. Such negotiations were carried on by envoys sent abroad, charged with the task of a particular business. They returned soon after the business was over. The practice of sending permanent legations started in the 14th century among the great Italian republics, Venice in particular, which was regarded as "the school and touch-stone of ambassadors." It is true that even in the 13th century the Venetian Republic had permanent legations in the important European capitals. Louis XI of France (1461-1483 was the first sovereign in Europe who sent permanent representatives to stay at the capitals of other States. Special treaties were often concluded providing for permanent legations, such as one in 1520 between the King of England and the Emperor of Germany.) "The Treaty of Westphalia (1648)," observes Sir Cecil Hurst, "encouraged the sovereignty and exclusive jurisdiction of European powers and by promoting political and commercial relatio iships between them became the basis upon which the whole institution of diplomatic intercourse was built up." The\_ convenience of international intercourse and increasing communication facili ties secured the general adoption of this practice, (and by the middle of the 17th century the system of permanent resident embassies became general until we reach the modern stage when they form a very important link in the maintenance and strengthening of friendly relations between the home Government and the State to which they are accredited) "Mutual advantage and a sense of the fitness of things combined to ensure that the representatives of a foreign sovereign would not be regarded as subject to the local jurisdiction."

It was observed by the Permanent Court of Arbitration in the Russian Indemnity (1912) that "diplomatic channels are the normal and regular means of communication between States in their relations governed by International Law."3 The foreign relations of States are conducted through duly accredited representatives or agents.

X Vienna Convention on Diplomatic Relations, 1961.—The Vienna Convention on Diplomatic Relations, 1961, which has been adverted to earlier while dealing with the Codification of the Law of Nations,4 expresses in its preamble the conviction that an international convention on diplomatic intercourse, privileges and immunities would contribute to friendly relations among States irrespective of their differing constitutional and social systems. It has been emphasised that the purpose of such privileges and immunities is to ensure the efficient performance of the functions by diplomatic missions as representing States and not to benefit individuals. The rules of customary international law should continue to govern questions which have not been expressly regulated by the Convention.

Right of Legation.—The right of a State to send and receive diplomatic envoys is termed as the right of legation. The right of a State to send its diplomatic envoy to another State is the active right of legation, while that of receiving a diplomatic envoy from another State is the passive right of legation. The right of legation is an important and precious attribute of the sovereignty of any State. Sovereign States possess the right of legation in full, i.e., they have the right of receiving diplomatic envoys from, and sending diplomatic agents to, other States. The right of legation of part-sovereign

<sup>1.</sup> Opinion cited, Deak. Southern California Law Review, p. 215.

<sup>2.</sup> Sir Cecil J. B. Hurst: International Law, The Collected Papers, p. 114. 5. XI p. 96

<sup>4.</sup> Chap. V. p. 61 ante.

States, is limited, depending upon the nature of freedom that they enjoy. The United Nations although not a State, possesses the right of legation by virtue of being an international person sui generis.

The right of legation is generally the right of a de jure government and a belligerent community has no such right, unless the de facto government assumes a permanent character and receives recognition.

After World War I almost all members of the British Commonwealth have the right of legation.

- Classes of Diplomatic Representatives.—The Congress of Vienna, 1815, classified diplomatic representatives into three classes, to which the Congress of Aix-la-Chapelle, 1818, added a fourth. They are as below in order of seniority of rank.
- 1. Ambassadors, Papal Legates and Nuncios.—They are the representatives of the person and dignity of the sovereign or Head of the State accrediting them and as such enjoy special honours. On their arrival at the foreign capital when they present a sealed letter of credence conferring on them their official character, they are entitled to public audience from the Head of the State to whom they are accredited. They have also the privilege of negotiating with the Head of the State personally. They are entitled to the title of "Excellency." Only States enjoying royal honours can send ambassadors.

The diplomatic envoys sent by the Holy See are called Papal Legates or Nuncios.

- 2. Ministers Plenipotentiary and Envoys Extraordinary.—They are not the personal representatives of the sovereigns or Heads of their State, though they are, no doubt, accredited to them. They have a private audience from the Head of the State when on their arrival at foreign capital they present the letter of credence. They have also no audience as of right with a Head of State personally and receive the title of "Excellency" by courtesy only.
- 3. Ministers Resident.—They are accredited to sovereigns and rank below the Ministers Plenipotentiary and envoys extraordinary. They do not enjoy the title "Excellency" even by courtesy. This class was added in 1818.
- Charges d'Affaires.—They are accredited not by a Head of State to another Head of State but by a Minister of Foreign Affairs to a Minister of Foreign Affairs. On arrival at the foreign capital they present their letter of credence to the Minister of Foreign Affairs.

The distinction between the different classes of diplomatic agents is purely ceremonial for all of them enjoy the same diplomatic immunities. Moreover even the privilege of ambassadors to negotiate with a Head of State personally is of little use as most of the important business is attended to by the Minister of Foreign Affairs.

With the advance of civilization, exchange of ideas and opinions, scientific discoveries and development of international trade, official international intercourse is almost impossible without the appointment of diplomatic agents. In this state of affairs any nation which does not take advantage of diplomatic agents is automatically relegated to the background in the family of nations.

Besides the above there are High Commissioners accredited to a member of the Commonwealth by another, the delegates of different member-States to the U. N. and the Judges of the International Court of Justice who enjoy diplomatic immunities.

A distinction may, however, be made between diplomats representing the State in a temporary and ceremonial sense and permanent political envoys. The former are sent abroad in a temporary and ceremonial sense, such as coronations, weddings, funerals and jubilees or conference and congress; while

the latter are permanently accredited to a State.

Diplomatic Corps.—A diplomatic corps consists of all the diplomatic envoys from various countries of the world accredited to a particular State. Its head is termed as the Doyen, which office is held by the Papal Nuncio, and, in his absence, by the oldest ambassador. The main function of the diplomatic corps is to protect the rights, privileges and honours of the body of diplomatic envoys.

Appointment.—International Law does not prescribe any qualifications of diplomatic agents, although municipal laws may contain the requisite qualifications. Birth, breeding, looks, education and wealth have their distinct value. A diplomatic agent must, however, have a sound political judgment and be able to analyse events and size up their effect on the foreign policy of the country. He should also be able to speak the language of the country he is accredited to, know generally the country's history, its economy and important people in that country. Above all, his general demeanour should be of affability and good nature, tempered with dignity. And the statement of Talleyrand, Napoleon's famous Foriegn Minister, "Et, surtout pas trop de zele" (And, above all, don't be excited) is as true today as when it was said.

The appointment of an individual as ambassador, minister or Charges d'Affaires is announced to the State to which he is accredited in certain official papers to be handed in by the envoy to the State to which he is sent. The first official paper is the Letter of Credence or Lettres de Creance, which sets forth the name of the diplomatic agent and the general object of his mission. The envoy takes with him the scaled letter of credence and an open copy. In the case of Ambassadors and Ministers the letter of credence is addressed by the sovereign or Head of the State and is addressed to the sovereign or head of the receiving State, but in the case of Charges d'Affaires it is addressed by a foreign minister to another foreign minister. Diplomatic agents charged with special business carry with them a document called Full Powers (pleins pouvoirs), which is given in lettets patent signed by the Head of the State.

Full Powers.—A diplomatic agent charged with special business carries with him a document called Full Powers (pleins pouvoirs). It is a written commission authorising the agent to negotiate in the name of his head of State. It empowers him to negotiate a special treaty or convention or any other task entrusted to him. It is given in letters-patent signed by the Head of the State, and it is either limited or unlimited Full Powers, according to the requirements of the case.

Where Full Powers are essential.—In the matter of inter-Governmental agreements and inter-departmental agreements Full Powers are essential. In the case of the British Commonwealth of Nations, Full Powers are issued by the appropriate Minister of the Dominion and the agreements are ratified by him. That in the past removed formal restrictions and delays in the full exercise of the treaty-making power by the Dominions.

Recent international practice is favouring the development of treaties negotiated and signed expressly on behalf of the Head of the State by virtue of Full Powers received from him. That is a speedy process and obviates the cumbrous procedure of ratification of a treaty or, as in the United States, the consent of two-thirds of the Senate. The validity of such treaties is however in no way diminished, and stands on the same footing as ordinary treaties

Notification of Arrival.-On arrival at the foreign capital of the country to which he is accredited, the diplomatic minister notifies his arrival to the foreign minister and demands an audience of the Head of the State for delivering his letter of credence. As stated above, only ambassadors are entitled to a public audience, while ministers of the second and third classes have a right to a private audience only. The diplomatic agent makes a formal speech to the Head of the State at the time of such interview. In it he expresses his satisfaction at his appointment and conveys assurances of friendship. The Sovereign or Head of the State welcomes his appointment and assures of his country's friendship. Usually a copy of the speech of the ambassador is furnished beforehand to the Foreign Minister of the State to which the ambassador is accredited.

When can a State refuse ?- A State may decline to receive a particular person as an envoy, without causing any offence, in the following cases:

(1) If he is personally obnoxious to the sovereign of the country to which he is being sent on account of his personal character, e. g., refusal by France to accept the Duke of Buckingham as the ambassador of Charles I of England because he had in an earlier visit posed to be a lover of the Queen, or decline by Austria-Hungary in 1885 to accept Mr. Keiley as Minister of the United States because Mr. Keiley had a wife who was Jewess.

(2) If he has shown himself avowedly hostile to the people or institutions of the State to which he is accredited by his public pronouncement or otherwise; e.g., refusal by Italy to accept Mr. Keiley as ambassador of the United States in 1885 because he had protested in 1871 against the annexation

of the Papal States by Italy.

(3) If he is one of the subjects of the State to which he is being sent and the accredited State does not want to accord him immunities that are attached to the office of an envoy. But if he is once accepted he will receive full diplomatic privileges. Such was the case with Sir Halliday Macartney, who, aluthough a British subject, acted as the Secretary to the Chinese legation in London in 1890. No objection had been made at the time of his appointment, and accordingly it was held that he could not be obliged to pay rates on the house occupied by him. It was laid down in that case that a government is entitled to refuse to receive on: of its own nationals as a member of the diplomatic staff of a foreign embassy or legation, but if it receives him without imposing any condition or stipulation that he shall be subject to the local jurisdiction, he is entitled to the same measure of diplomatic privilege and immunity as is accorded to any foreign member of the staff. He would, therefore, seem to be clearly entitled to the privileges of the 'corps diplomatique' and it would follow that his personal effects would be exempt

In order to avoid unpleasantness on account of the refusal by a State to accept the envoy, the State sending the envoy receives the approval beforehand of the proposed envoy as porsona grata. The formal acceptance of a proposal that a particular individual should be accredited is known as agreation.

Macartney v. Garbutt, 24 Q. B. D. 368.

The Vienna Convention on Diplomatic Relations, 1961, stipulates that the members of the diplomatic staff of the mission should, in principle, be of the nationality of the sending State, and they may be appointed from among the nationals of the receiving State, only with the consent of that State which may be withdrawn at any time. The receiving State has also a similar right with regard to the nationals of a third State who are also not nationals of the sending State.

Article 4 of the Vienna Convention codifies the existing practice by providing that the receiving State is not obliged to give reasons to the sending

State for refusing on agrement.

Designation of Diplomatic Agents .- A State having the right to send public ministers of different classes may confer on its diplomatic agents whatever rank it chooses. It is usually a matter of agreement between the two States. The practice is that ministers of equal rank are exchanged between two States.

Among the Commonwealth countries the diplomatic agents exchanged between them are termed High Commissioners, who are now ranked with Ambassadors and enjoy the title of "Excellency".

By a decree of May 22, 1922, Russia abolished the titles of ambassadors, envoys, etc. and maintains a single class called "Representants Plenipoten-

tiaries."

A State sending a diplomatic agent may confer on him full powers to represent his sovereign at different courts or at a Congress of different nations.

Size of the mission.—The Vienna Convention on Diplomatic Relations, 1961, stipulates in Art. 11 that, in the absence of a specific agreement, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal. This means that, in the absence of an agreement, the receiving State is ultimately to determine the size of the mission in its territory, with due regard to the circumstances and conditions

in the receiving State and to the needs of the mission.

Functions of diplomatic agent.—He has a variety of functions to perform. He represents the Head of his own State and as such is the mouthpiece of his home Government in a foreign State. He should never forget that he represents his country and its Government. He has to interpret the policy of his government to the accredited State and to maintain good relations between his home country and the country to which he is accredited, and to create goodwill for his own country. He has to create and project an image of his country which makes it respected and admired. "It is his duty to represent his country in its multifarious phases and facets-its political approach, social tradition, economic activities and cultural heritage. to maintain the reputation and prestige of his country." It is his duty to take up the matter at once with the foreign minister of the accredited State if any disrespect is shown to his country or when the interests of his countrymen are threatened. In short, he has to enhance the reputation of his country in every possible manner. Dr. Ross observes that as far as International Law is concerned an envoy is an instrument of negotiation for the competent authoritics in his home State.

The main purpose of an ambassa log's work is "to create in the country to which one is accredited, the greatest possible degree of understanding of one's own nation, its hopes and fears, its achievements, and the objectives towards which it aspires."

His task is to observe attentively every occurrence that might have its repercussion in his home State, and to report such observations to his Govern-

ment.

A diplomatic envoy is required to protect the persons, property and subjects of his home State which might be within the boundaries of the State to which he is accredited. He has the obligation to safeguard and promote the interests of his own country.

His office registers births, deaths and marriages of the subjects of his own State. He has to send despatches to his country regarding political and social conditions in the accredited State which might affect the interests of his home State. He deals with the foreign office of the accredited State for extradition of a national of his State in case the latter has committed a crime in his State. He issues passports and protects the property and interests of the nationals of his country.

A diplomatic agent is not expected to take part in local disputes and other internal or political affairs of the State where he has been sent. He should not discuss the desirability or otherwise of a pending legislation in that State or incur the displeasure of the accredited State by his interference in its internal affairs, or offend it in any matter whatsoever.

Oppenheim very correctly sums up the functions of an envoy under three heads, viz., Negotiation, i.e., acting as a medium between his home State and the foreign State; Ciscrvation, i.e., keeping a vigilant eye over the happenings in the foreign State, and Protection, i.e., protecting the person and property of the nationals of his home State staying abroad.

Diplomatic Immunities—Nature and Enforcement.—A diplomatic envoy is deemed for the purpose of jurisdiction and control to be outside the territory of the State in which he really is. He is regarded just as sacrosanct as the Head of the State that he represents and enjoys immunities to enable him to discharge his functions efficiently and in an atmosphere of absolute fearlessness.

An ambassador docs not owe even a temporary allegiance to the sovereign to whom he is accredited, and, if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country.

Article 26 of the 1961-Convention on Diplomatic Relations stipulates that, subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

"Diplomatic privileges as commonly recognised today are little more than states to treat foreign representatives as exempt from the local jurisdiction." In the words of Lord Campbell in Magdalena Steam Navigation Co. v. Martin, a foreign ambassador does not owe even a temporary allegiance to the sovereign to whom he is accredited. Sir Cecil J. B. Hurst observes that "this non-subjection... to the local law is admitted because the purpose of the individual's presence is the maintenance of relations between the sovereign whom he represents and the sovereign to whom he is accredited. The privileges which he is accorded are conditioned and limited by the purpose for which he is received. If the representative is called upon by his own sovereign to perform functions other than those of maintaining relations with the sovereign to whom he is accredited, the purpose with which the latter acquiesces in his non-subjection to the local jurisdiction ceases to operate in respect of those functions. The extraterritoriality or non-subjection to the local jurisdiction

enjoyed by a member of a foreign diplomatic mission is, therefore, due, not to the fact that he is engaged on the business of a foreign government, but to the fact that he is part of the machine for maintaining relations between the two governments."1

Three different theories .- The universal practice of granting diplomatic privileges and immunities may be traced to three different theories, viz.

Extraterritoriality.-This is based upon the fiction that an ambassador, residing in the accredited State, should be treated for purposes of jurisdiction as he were not present. Extraterritoriality is a fiction which has no foundation either in law or in fact, and no effort of legal construction will ever succeed in proving that the person and the legation buildings of a diplomatic agent situated in the capital of State X are on territory which is foreign from the point of view of the State in question.2

In Radwan v. Radwan,3 the British Court held that a consulate general in the United Kingdom did not constitute foreign territory for the purpose of recognizing a divorce under S. 2 (a) of the Recognition of Divorces and Legal Separation Act. Mr. Justice Cumming-Bruce observed that there was consensus that there was no valid foundation for the alleged rule that diplomatic premises were to be regarded as outside the territory of the receiving State, and adopted the observations of Fawcett in the Law of Nations, p. 65: "The premises of a mission are invictable and the local authorities may enter them only with the consent of the head of the mission. But this does not make the premises foreign territory or take them out of the reach of local law for many purposes. It was significant that neither Art. 31 of the Vienna Convention on Consular Relations, 1963, nor Art. 22 of the Vienna Convention on Diplomatic Relations, 1961, stated that the premises of a mission were part of the sending State and if that had been the view of contracting parties it would no doubt have been formulated.

2. Representative character of diplomat.—The second theory bases diplomatic privileges and immunities upon the representative character of the diplomat. It "equates the immunities of the agent with those of the sending State itself." This theory is inadequate as "it explains only those exemptions concerning official acts which diplomatic agents enjoy in common with other State officials, but leaves unexplained those immunities which they possess with reference to acts performed in a private capacity."

3. Interest of function. - The third theory bases diplomatic privileges and immunities upon the interest of function with a view to ensuring free communication between States. The one said basis for dealing with the subject of diplomatic immunities is the necessity of permitting free and unhampered exercise of the diplomatic function and of maintaining the dignity of the diplomatic representative and the State which he represents and the respect properly due to secular traditions.4 Preuss very pertinently observes : "As the foundation of diplomatic immunities, the theory ne impediatur legatio or the interest of function is now predominant, having supplanted the function of exterritoriality as the theoretical basis of diplomatic privileges and immunities. It shares the field with the representation theory, without being excluded by it."5

1. Sir Cecil J. B. Hurst : International Law : The Collected Papers, p. 115.

2. C/f. Professor Diena, Report to the League of Nations Committee of Experts for the Progressive Codification of International Law.

3. The Times (London) May 12, 1972; A. J. L. 1972, p. 375.
4. Committee of Experts for the Progressive Codification of International Law. 5. Preuss loc. cit. 181-187.

39

The immunities are founded on common usage and tacit consent of nations. "Modern Public International Law rejects the theory of extraterritoriality and prefers rather the necessity of recognising a full dignity in the State which delegates an ambassador. In a word, the States recognise a parity of rights and privileges amongst themselves and concede a perfect equilibrium of authority and of jurisdiction."

Ommunities and Privileges.—The various diplomatic immunities and

privileges may be summed up as follows :-

the person of a public minister is sacred and inviolate. Whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of crime against the whole world. In Palachie case it was held that ambassadors should be kept free from all injuries and wrongs, and by the law of all countries and of all nations, they ought to be safe and sure in every place, in so much that it is not lawful to hurt the ambassador of our enemy; and herewith agreeth the civil law. "The duty to care for and protect a foreign minister is higher than the general duty on a state to protect all persons on its territory whether natives or foreigners." The person of an ambassador has ever been held sacred and inviolable, by the law of nations.

A diplomatic agent may, however, be expelled and, if necessary, arrested for being sent home if he plots against the Head of the receiving State or the State itself, is guilty of conspiracy of espionage, or otherwise causes disturbance to internal order and peace. In the same manner he is not entitled to complain if he is injured by retaliation caused by his unreasonable or unjustified conduct.

2. Immunity from Criminal Jurisdiction.—A diplomatic envoy accredited to a State enjoys absolute immunity from criminal jurisdiction and police action as he is in no sense considered to be under its legal authority. If a diplomatic agent commits a crime the only remedy open to the accredited State is to report the matter to his home-Government and demand his recall and punishment according to the law of his country. If, however, he conspires to overthrow the accredited State, he may be arrested for the time being so that he may be safely sent home in due course.

The immunity of diplomatic agents is derived from the local law of each country. The Common Law of England and the Diplomatic Privileges Act, 1708, the Pan-American Convention of 1928 and the Decree of the Supreme Soviet of the 14th January, 1927, grant personal immunity to diplomatic agents and other members of the mission by virtue of being the representatives of foreign sovereigns.

3. Immunity from Civil Jurisdiction.—A diplomatic agent as well as his suite is exempt from the local jurisdiction. He is free from local process as well as from personal restraint. No civil action of any kind can be brought against him in the civil courts of the accredited State. He cannot be compelled to appear in court and plead, but if he elects to waive his privilege the courts will deal with him as an ordinary citizen. Such waiver of jurisdiction can only be taken notice of when the court is about or is being asked to exercise jurisdiction over him and not at any previous time.

By the law of nations, neither an ambassador, nor any of his train or

Rose v. The King, 1947, 3 D. L. R. 618.

2. Pradier Fodere, Vol. II, p. 12.

comites, can be prosecuted for any debt or contract in the courts of that kingdom wherein he is sent to reside: The Case of Andrew Artemonowitz Mattueof, Ambassador of Muscovy.1

The public minister of a foreign state, accredited to and received by the Sovereign of this country, having no real property in England and having done nothing to disentitle him to the general privileges of such public minister, cannot, while he remains such public minister, be such against his will, in this country, in a civil action; although such action may arise out of commercial transactions by him here, and although neither his person nor his goods be touched by the suit : The Magdalena Steam Navigation Co. v. Martin.2

It was observed in the case of Norway v. Federal Sugar Resining Coy., 3 that "a sovereign State, generally speaking, is not obliged to go into court; but, if it seeks the assistance of the court, it would seem to be in accord with the best principles of modern law that it should be oblig d to submit to the jurisdiction of the court in respect to any set-off or counterclaim properly assertable as a defence in a similar suit between private litigants."

/ It would thus appear that a diplomat is not exempt from a civil jurisdiction in the following two cases: (i) where he has waived his privilege, submits to or invites the jurisdiction; or (ii) where he, as a plaintiff, is made subject to a set-off or counterclaim.

A foreign sovereign by bringing an action in the English Courts, however, did not waive his immunity against counterclaims which were unrelated to and independent of the subject-matter of the action.

Both under the common law and under the Diplomatic Privileges Act, 1708, a diplomatic agent accredited to the Crown by a foreign State is absolutely privileged from being sued in English Courts and any writ issued against him is absolutely null and void. This diplomatic privilege can be waived, if at all, only with full knowledge of the party's rights, and with the sanction of his Sovereign or (if he is of inferior rank to a minister plenipotentiary) his official superior : In Re Republic of Bolivia Syndicate, Limited; & Dickinson v. Del Solar.

Astbury, J., while referring to the question of waiver of privilege by an ambassador, observed in Re. Republic of Bolivio Exploration Syndicates that on this question there were three matters to be discussed. In the first place, waiver if it be possible, must be strictly proved. It implies a knowledge of the rights waived. Secondly, knowledge of our common and statute law cannot be imputed to a foreign subject residing in England as diplomatic agent of a foreign State. Thirdly, he was far from satisfied that a subordinate secretary can effectually waive his privilege without the sanction of his Sovereign of Legation.

In Great Britain the provisions of the Diplomatic Privileges Act, 1708, are vigorous and provide that processes issued against foreign ministers or writs directing arrest of an ambassador are null and void, and any person presuming to sue forth such a writ and all officers executing it shall be deemed violators of the laws of nations and disturbers of the public repose. "Enactments

<sup>1 (1709) 10</sup> Mod. Rep. 4: 6 B. 1. L. C. 2. 2. (1859) 2 E. & E. 91 : 6 B. I. L. C. 17.

<sup>286</sup> Fed Cas. 188.
4. High Commissioner for India v. Ghosb, (1960) 1 Q. B 134; 7 B. I. L. C. 683.
5. (1914) 1 Ch. 139: 6 B. I. L. C. 39.

<sup>6. (1930) 1</sup> K. B. 376 : 6 B. I. L. C. 142.

of this character", observes Sir Cecil Hurst, "must, however, be read subject to the general understandings of International Law. They cannot mean more than that the jurisdiction of the courts is not to be exercised against a person entitled to immunities against his will. They do not exclude, and cannot be held to exclude, a voluntary submission to the jurisdiction, provided that such submission is effected in a way that makes it clear that it has been done in due form and with full knowledge of the effects."

The Court will not compel a foreign ambassador to give security for costs:

The Duke De Montellano v. Christin.

If an ambassador or public minister, during his residence in England, violates the character in which he is accredited to them, by engaging in commercial transactions, that may raise a question between the government of England and that of the country by which he is sent; but he does not thereby followed the general privilege which the law of nations has conferred upon persons of a foreign country cannot be sued against his will in England, although the faction may arise out of commercial transactions carried on by him there: Magdalena Steam Navigation Co. v. Martin.

The local courts, however, have jurisdiction with regard to immovable property held by him in the accredited State not as an envoy but in his private character. According to Martens in his Precis du Droit des Gens, the ambassdor's privilege does not extend to property which belongs to him in any other capacity. The law is similarly laid down by the American jurist Dr. Wheaton, in his treatise on International Law: "The personal effects or movables belonging to the minister within the territory of the State where he resides, are entirely exempt from the local jurisdiction; so also of his dwelling house; but any other real property, or immovables, of which he may be possessed within the foreign territory, is subject to its laws and jurisdiction. Nor is the personal property of which he may be possessed as a merchant carrying on trade, or in a fiduciary character as an executor, etc., exempt from the operation of the local laws."

- 4. Exemption from subpoena as witness.—Persons enjoying immunity from jurisdiction cannot be made to appear as witnesses in any civil, criminal or administrative or any territorial court. They are entitled under the law governing international relations to be relieved from service by subpoena or sworn as a witness in any case. They may, however, waive their privilege.
- of- 5. Immunity of Envoy's Retinue.—The retinue of an envoy consists
  - (a) officials and other servants of the legation;
  - (b) wife, children and other members of his family living with him under the same roof;
  - (c) his private servants; and,
  - (d) couriers.

As said above, a diplomatic agent has complete immunity with regard to his person and that of his suite. The immunity, though in a lesser degree,

- 1. International Law: The Collected Papers, p 255.
- 2. (1816) 5 M. & S 501: 6 B. I. L. C. 4. 3. (1854) 14 C. B. 487: 6 B. I. L. C. 78. 4. (1859) 2 E. & E. 94.
- 5. Lib. 7, c 5 S. 217, Edited, 1802, by Cobbett, Book 7, c. 5 Sect. 3.

6. Vol I. p. 278.

extends to the ambassador's wife, children, his official staff, secretaries, inte preters, naval and military attaches, chaplain and servants, which are the necessary accompaniment for his comfort and convenience. Diplomatic immunity is limited to such members of the family who are living with the diplomatic agent. The immunities in the case of servants extend to indoor and outdoor domestic servants including chauffeurs and gardeners. It is usual for the envoy to deposit with the Foreign Office a list of such persons for whom immunity is claimed.

The Vienna Convention on Diplomatic Relations, 1961, failed to define the term 'member of the family' and under the Convention members of the family of a diplomat would be those forming part of his household.

Personal inviolability from the jurisdiction of the State, however, does not extend to visitors and hangers-on of the embassy.

A chaplain to an ambassador, if he does no duty in his house, shall not be protected.1

The other members of the retinue of the diplomatic agents, such as officials and other servants of the legation, also enjoy the immunities detailed above. But such privileges are extended only to those who are officially attached to the legation.

The dependent relatives of the diplomatic agent living with him are also immune from the jurisdiction of civil and criminal courts and enjoy other privileges.

As regards immunity of private servants of diplomatic agents, the practice is not yet clearly established. They are no doubt exempt from civil jurisdiction unless engaged in trade, but in criminal matters Great Britain claims jurisdiction if the offence is committed by servants outside the residence of the diplomatic agent/ After the commission of the crime the servant is dismissed by the envoy or is handed over to the local authorities to facilitate his trial. When an offence has been committed by him within the envoy's residence, the servant is sent home for necessary action.

Fenwick is of the view that private servants, if citizens of the foreign State, are amenable to its laws. Otherwise they are exempt from local jurisdiction, but their exemption may be waived by the minister at his discretion.

A person who is only retained as the servant of an ambassador is not protected from arrest. In order to claim immunity from arrest, he ought to be a domestic servant, and really to execute the duty of his office, and being the office for which he has his certificate, but only gets himself entered upon the list to have the benefit of a protection, the Court will not endure it. There is no privilege to servants of ambassadors unless they are bona fide menial and domestic servants.<sup>3</sup>

Actual domestic service to a foreign minister must be shown. A domestic physician is not protected by an ambassador retainer.

Where the servant of an ambassador did not reside in his master's house, but rented and lived in another, port of which he let in lodgings, his

Seacomb v. Bowlney (1744) I Wils. K. B. 20: 6 B. I. L. C., 207.
 Cross v. Talbot (1725) 8 Mod. 288; 6 BILC, 201.

3. Poitier v. Croza (1749) 1 Wm Bl. 48 6. BILC. 201. 4. Heathfield v Chilton (1767) 4 Burr 2015 6 BILC., 216.

5 Lockwood v. Dr. Coysgarne (1765) 3 Burr. 1676: 6 BILC. 213.

goods in that house not being necessary for the convenience of the ambassador were liable to be distrained for poor rates.1

The immunities enjoyed by those in the service of a diplomatic agent are purely derivative. The privilege is the privilege of the employer, not the privilege of the servant himself. Being only derivative, it ceases the moment that the service ceases.<sup>2</sup> An ambassador cannot protect; it is the law that gives the protection.<sup>3</sup>

Couriers or despatch-bearers being officially connected with the embassy are immune from civil and criminal jurisdiction. They have a special passport for their duties and a right of innocent passage through third States.

official residence of the ambassador, with goods and furniture, stables and carriages, is considered as though it is situate outside the territory of the accredited State. It is regarded as sacred and is exempt from the local jurisdiction. It is virtually held to be a portion of the accrediting State. In other words, the fiction of exterritoriality is applied to the residence of the diplomatic agent.

The immunity also extends to buildings, other than residence, occupied by a diplomatic agent for his diplomatic work. It also applies to carriages used by him in execution of his functions. Such immunity means that no police officer or tax collector can enter his residence—without his consent for discharging his duties. As Vattel observes, "the independence of the ambassador would be very imperfect and his security very precarious if the house in which he lives were not to enjoy a perfect immunity and to be inaccessible to the ordinary officer of Justice......to insult it is a crime both against the State and against all other nations."

In U. S. v. Hand it was laid down by the Court that the law of nations identified the property of a foreign minister, attached to his person or in his use with his person so that attack upon it was equivalent to an attack on the minister and his sovereign.

It should, however, be noted that such immunity does not enable the diplomatic agent to give shelter to a criminal. He is not to turn his residence into an asylum for fugitives from the local justice. He must surrender him to the prosecuting Government at its request. On the failure of the envoy to surrender him measures may be taken to induce him to do so by surrounding the house and complaining the act to the Government which had accredited him. The envoy must also not assume powers of jurisdiction within the legation.

On February 10, 1973, the Government of Pakistan expelled the Iraqi ambassador and the military attache and recalled its own ambassador from Baghdad, following the discovery of a large store of arms and ammunition in the embassy premises at Islamabad. It was alleged that the arms had been smuggled into that country by the embassy for distribution to subversive elements. Islamabad in its protest note called the activities of the Government of Iraq through its embassy in Pakistan as completely contrary to diplomatic norms and practices, which amounted to a grave abuse of privileges and were unwarranted interference in the affairs of Pakistan and constituted an unfriendly act towards Pakistan.

Novello v. Toogood (1823) 1 B. & C. 554: 6 BILC. 221.
 Fisher v. Begrez 2 C. & M. 240.

Lockwond v. Dr. Coysgarne (1765) 3 Burr. 1676: 6 B.I.L.G. 213.
 (1810) Fed. Cas. No. 1297.

On the refusal of the Iraqi ambassador to allow the Director-General of the Foreign Office and other officials of Pakistan to enter the Chancery for a search, the Pakistan Government organised a raid on February 10, 1973, and a large number of policemen and members of the Pakistani security forces forced their way into the building. The Iraqi Government described Islamabad action as a serious violation of international law. The embassy was raided evidently to dramatise the event, inasmuch as journalists, photographers and press agency representatives were present when the sanctity of the embassy building was violated, which proved that there was premeditated collusion.

Grant of Asylum. - The Government of India while allowing the Soviet defector Mr. Aziz Ouloug-zade to go to the United Kingdom, the country of his choice, from India in December 1967, however, urged foreign missions in India to respect the well-established international practice of not affording asylum to any person within their premises and told them that it did not recognize the right of such missions to give asylum to any person. The matter arsose out of an incident in which the Soviet defector had sought refuge in the American Embassy and stayed there for five days before placing himself under the protection of the Government of India. In its circular to all diplomatic missions and consular posts, issued in the wake of the above diplomatic incident, the Government of India expressed the view that the immunity from local jurisdiction is granted to diplomatic missions and legations to enable the representatives and members of the missions concerned to enjoy full opportunity to represent the interests of their states and to promote friendly relations between India and their countries. As regards the legal position, the Legal Adviser to the Ministry of External Affairs drew a distinction between territorial asylum and diplomatic asylum and observed that the latter was not recognised as a part of general international law. It was clear from the Vienna Convention of 1961 on diplomatic relations to which India was a party, that diplomatic missions should not be used for purposes which were incompatible with performance of their official functions.

In this connection the most celebrated example of diplomatic asylum concerning Senor Haya De La Torre, a Peruvian political leader, may be referred. He was given asylum in the Columbian Embassy in Peru in January 1949. The Columbian Embassy in Peru requested safe conduct for Senor De La Torre to leave the country which was refused. The matter was taken to the World Court which ruled that Peru was not obliged to grant safe conduct to Senor De La Torre. Subsequently the Court ruled that the asylum granted by the Columbian Embassy to Senor De La Torre must cease as it had been given irregularly. It observed that a decision to grant diplomatic asylum involves a derogation from the sovereignty of that State and such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case.

As regards the territorial asylum every sovereign State has the right and competence to grant asylum to foreigners prosecuted or threatened with prosecution in their home States, though the foreigners have no right to be granted asylum. Territorial asylum is granted in cases where the person concerned genuinely apprehends persecution or is wanted for political crimes in his home State, and it would not be proper to grant territorial asylum to an ordinary criminal. The asylum granted to the Dalai Lama and a number of Tibetan refugees by India furnishes an example of territorial asylum.

The U. N. General Assembly adopted unanimously a declaration on territorial asylum which makes it clear that "the right to seek and enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity."

7. Exemption from Taxes.—The envoy is free from the payment of taxes levied upon his residence as the receiving State has no jurisdiction over such residence. He is expected to pay the charges for sewerage, light and water taxes, but he cannot be compelled to pay the same since he is immune from legal process. Very often such taxes are also not charged from him.

The municipal laws of most States allow an ambassador to receive goods duty free from abroad for his own use. His goods and baggage are also exempt from customs examination.

8. Exemption from seizure of goods.—The ambassador cannot be sued for debts whether contracted before or in the course of his mission; he is free from arrest and his furniture cannot be seized or attached for the same.

By the law of nations, neither an ambassador, nor any of his train or comites, can be prosecuted for any debt or contract in the courts of that king dom wherein he is sent to reside: The Case of Andrew Artemonowitz Mattueof, Ambassador of Muscovy. 1

Grotius thus explains in his characteristically lucid language the exemption of the goods of a public minister from seizure for debt :

"As to what respects the personal effects of an ambassador, which are considered as belonging to his person, they are not liable to seizure, neither for the payment nor for security of a debt, either by order of a court of justice, or, as some pretend, by command of the sovereign. This, in my judg ment, is the soundest opinion; for an ambassador, in order to enjoy complete security, ought to be exempt from every species of restraint both as to his person, and as to those things which are necessary for his use. If, then, he has contracted debts, and if, which is usually the case, he has no real property in the country, he should be politely requested to pay, and if he refuses, resort must be had to his sovereign."

Bynkershock also shares the view of Grotius when he observes that the effects of an ambassador could not be seized, either for payment or for security of the debt, because they are considered as appertaining to his person.

Vattel also agrees with this view except that, if a public minister en gaged in trade, his personal goods might be attached to compel him to answer

The English and American Courts have held that a judicial process is not possible against a diplomatic agent and any person so doing violates the law of nations and disturbs public peace. If, however, he brings an action before a local court, he is obliged to observe the rules of the court and to pay costs if he loses: (In re Suarez: Suarez v. Suarez, The Amazone's Bergman v. De Sieyes.4

Even though where an ambassador, sued as an administrator to an intestate's estate, has submitted to the jurisdiction down to judgment, and an order has been made determining his liability to pay money into Court, he can still assert his immunity from process by way of execution and set up the

<sup>1. (1709) 10</sup> Mod. Rep. 41: 6B. I. L. C. 2

<sup>2. (1917) 2</sup> Ch. 131 3. (1940) Probate, 40.

<sup>4. (1946) 71</sup> F. Supp 334.

Diplomatic Privileges Act, 1708, as an answer to an application for leave to issue execution against his personal property: In re Suarez v. Suarez.<sup>1</sup>

9. Right to worship.—An ambassador has the right of having private chapel in his hotel according to his own religion. He has perfect freedom to celebrate divine worship in his own way, even though prescribed by the country in which he resides. But he is not free to invite subjects of the accredited country to such worship if the law of that country does not allow it.

of communication to enable him to discharge his functions properly. His despatches are immune from local jurisdiction and censure, even in third countries. Such immunity has received general approval in the conduct of relations between independent sovereign States. His mail goes in diplomatic bag, free from postal censorship.

Commencement and discontinuance of immunities.—Diplomatic

officers enter upon the enjoyment of their immunity from the moment they pass the frontier of the State where they are going to serve and make known

their position.

The immunities continue during the period that the mission may not be suspended; and even where the mission has terminated immunity continues for a reasonable time after the termination of the envoy's mission to enable him to wind up his affair and to be able to withdraw the mission: Musurus Bey v. Gadban,2

After referring to a number of cases, Sir Cecil Hurst observes that "these cases show that the true rule is that the immunities of a diplomatic agent subsit for a period after his functions have come to an end, long enough to enable him to settle up his affairs and return home. How long a time must reasonably be allowed for this purpose is a question which must be left to the government to which he had been accredited.3

The immunity of an ambassador from process to the courts of this country extends not merely to the time during which he is accredited to the sovereign, but to such a reasonable period after he has presented his letters of recall as is necessary to enable him to wind up his official business and prepare for his return to his own country, and he is not deprived of the immunity by reason that his successor is duly accredited before that period has elapsed.

Musurus Bey v. Gadban.2

Liability.—It has been stated above that the grant of diplomatic immunities is essential for the performance of diplomatic obligations, but such immunities should not be confused with immunity from legal liability for any wrongful acts. The accurate statement as observed by Lord Hewart, C. J., in the case of Dickinson v. Del Solar<sup>4</sup> is that "they are not liable to be sued in the English Courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction. The privilege is the privilege of the sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the sovereign or of the official superior to the agent."

In a speech at Quetta in 1957 the American ambassador to Pakistan, Mr. Horace Hildreth, criticised a member of the Pakistan National Assembly,

1 (1917) 2 Ch. 131.

4. (1) 0) I. K. B. 376: 7 BILC., 142.

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<sup>2. (1894) 2</sup> Q. B. 352; 6 B. I. L. C. 32

<sup>3.</sup> International Law: The Collected Papers, p. 4 94.

Mian Iftikharuddin, for certain speeches he had made in the Pakistan National Assembly. This was regarded as a breach of the privileges of the National Assembly and the matter was referred by the Assembly to the Committee of Privileges which asked Mr. Hildreth to appear before it. Mr. Horace Hildreth, the ambassador concerned, however, took the plea that as a diplomat he enjoyed immunity from appearance before the Committee of Privileges and that he claimed that immunity be extended to him.

Right of innocent Passage. - The opinion of jurists is divided upon the question as to whether a diplomatic agent appointed to a country is entitled to innocent passage through a third country if he has to go through the same for reaching the country to which he is sent. Grotius and Bynkershoek held the view that the inviolability of ambassadors was binding only on those to whom they were sent, and by whom they were received. Vattel, on the other hand, stated that passports were necessary to an ambassador, in passing through different territories on his way to his destined post in order to make known his public character. The opinion has of late settled in favour of the right of innocent passage. A diploma ic agent is entitled to enjoy complete personal security and any injury or insult to him is regarded as injury and insult both to the State to which he is accredited and the home State. The above view finds support from the case of Bergman v. De Sieyes. The defendant was the French Minister to Bolivia. He was served with civil process by the plaintiff, while he was passing through New York on his way from France to Bolivia. The defendant pleaded his immunity. It was held that a foreign minister en route, either to or from his post in another country, is entitled to innocent passage through a third country and is also critical to immunity from the jurisdiction of the courts of the third country that he would have if he were resident therein.

The Pan-American Convention, signed at Havana on the 20th February, 1928, expressly provides that persons of diplomatic missions shall enjoy the same immunities and privileges in the States which they cross to arrive at their post or to return to their own country and to whose Governments they have made known their position.

The position is, however, different when the third State is at war with the State to which the agent is accredited. In such circumstances the third State commits no breach of International Law if it arrests the envoy of a hostile State.

Further, diplomatic agents are not entitled to any special privileges or immunities in third States if they are sojourning there for their own purposes, though a short stay for rest in the course of an official journey will not disentitle them to such immunities.

Immunity of Plenipotentiaries of foreign countries at foreign courts.—In the New Chile Gold Mining Company v. Blanco<sup>2</sup> a question of considerable public interest as to the liability of the Ministers or plenipotentiaries of foreign countries at foreign courts to be sued in and served with process of the Courts of England, was raised. It is no doubt settled that ambassadors or ministers of foreign countries to England cannot be served with process there. The Court of Queen's Bench decided that in the exercise of their judicial discretion, they did not consider it right to allow a foreign Minister, resident at a foreign Court, to be sued in the English Courts at all events on a cause of action not arising in England. Mr. Baron Huddleston, however, observed in his judgment that the Court gave no judgment with regard to the

<sup>1. 1946) 71</sup> F. Supp. 334.

<sup>2. (1888) 4</sup> T. L. R. 346 : 6 BILC., 236.

privilege of ambassadors as the order was to be discharged on other points. But he wished to say that the privilege of ambassadors in a foreign country ought not to be extended beyond ambassadors in their own country, and he should be very loth, as at present advised, to hold that the same privilege was to be extended by English Courts to ambassadors in a foreign country, who may be sufficiently protected by the laws of that country. But as the decision went upon the other points, it was not necessary to determine that question. Mr. Justice Manisty, however, hesitated to accede to the above observations of Mr. Baron Huddleston and referred categorically in his judgment to the case of The Magdalena Steam Navigation Company v. Montomarose1 wherein Lord Compbell laid it down distinctly that such service of process was not allowable against a foreign ambassador abroad, who "must be left at liberty to devote himself body and soul to the business of his office." That principle, thought Mr. Justice Manisty, should be adhered to, and it would be violated by compelling a foreign ambassador to a foreign country to appear and defend himself in English Courts. Virtually, if summoned, he must appear, and probably in such an action as that he would have to come over to England, and that would be in reality a coercive process or kind of coactto, which was said by Grotius not to be permissible against ambassadors.

Proof of Diplomatic Status. - In the cases of the Duff Development Co. v. Kelantan Government [(1924) A. C. 797] the Parlement Belge, [5 P. D. 197] and Engelke v. Musmann, [(1928) A. C. 433], it was clearly laid down that the method of proving the status either of the sovereigns or of the ambassadors who are their representatives is the statement of the Grown, through the Attorney-General, stating that a particular person at the critical moment is qualified to be upon the list of diplomatic agents. In the last case it was stated by the House of Lords "that the statement of the Attorney-General was binding on the Court and that the defendant was, therefore, entitled to diplomatic privilege." Sir Cecil Hurst observes that the question of the right of a particular individual to diplomatic status is now to be included among those on which the decision rests with the Executive Government and not with the Courts, just as it does on the question whether a particular Government is to be recognized as the government of the country where it is established.

The English practice, as also the one prevailing in France and Belgium, clearly establishes that the authorities of the respective States intervene and prevent encroachments by the courts on the privileges of foreign diplomatic representatives, and that the declaration made by the Executive Government on the question of the status of a diplomatic representative is binding on the

Non-Permanent Envoys. - Non-permanent political envoys with special missions, such as representing their State at a Congress of different nations, or non-political envoys with ceremonial functions such as representing the State at a coronation, also enjoy the same privileges in respect of exterritoriality, legal protection of their persons and exemption from personal taxes and public requisitions.

Extension of diplomatic immunities to Arbitral Tribunals.-I'he First Peace Conference at The Hague in 1899 established the Convention which set up the Permanent Court of Arbitration. The latter contained a provision that the members of the tribunal when engaged in the exercise of their functions shall be entitled to diplomatic immunities. analogous Convention concluded at the Second Peace Conference in 1907, and

<sup>1. 2</sup> Ellis & Ellis's Reports, 94.

Art. 19 of the Statute of the Permanent Court of International Justice contain the corresponding provisions with regard to such immunity. Article 19 of the Statute of the International Court of Justice also provides that the members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Sir Cecil Hurst observes that "from the technical point of view the phrase employed in the 1899—Convention—that the members of the tribunal are to enjoy diplomatic immunities—is unfortunate; the functions they are fulfilling are not diplomatic; but the phrase is sufficient to achieve its purpose; it implies that they are not to be subject to the local jurisdiction." He further adds that if a member of an international tribunal is to perform his functions properly, he must be in a position of complete independence in respect of both the states which are parties to the dispute he is to settle. In such circumstances it seems probable that the extension of diplomatic immunities to members of the arbitral tribunals "has become one of the understandings" of International law. "In these days a Government would be thought to be acting contrary to the practice now obtaining among States if it attempted to subject to its own jurisdiction a member of an international tribunal who happened while engaged in the exercise of his duties to be physically present within its territory."

Covenant of the League.—The Covenant of the League of Nations also granted to the representatives of the members of the League, when engaged on the business of the League, diplomatic immunities and privileges. The functions of the League are more akin to diplomatic functions in the strict sense of the word, and the phrase "diplomatic immunities" connotes that "the individuals who by Art. 7 are to enjoy these diplomatic immunities are thereby to be placed, when engaged on the business of the League, in a position of non-subjection to the local jurisdiction."

Provisions in the Charter.—The establishment of the United Nations Organization has brought about the necessity of granting immunities from local jurisdiction to members of the Secretariat and other officials of the international organisation. Legislation to that effect has been carried out by America and Britain.

Article 105 of the Charter provides that the Organization and representatives of the members of the United Nations and officials of the Organization shall enjoy such privileges as are necessary for the independent exercise of their functions in connection with the Organization. The first General Assembly framed detailed provisions for immunity and inviolability of the property, premises and archives of the United Nations. The Judges of the International Court of Justice, when engaged on the business of the Court, enjoy diplomatic privileges and immunities. The agents, counsel and advocates of parties before the Court also enjoy the privileges and immunities necessary for the independent exercise of their duties.

Termination of Diplomatic Mission A dipomatic mission may terminate for various reasons. They are as follows:

1. Recall of the envoy by his accrediting State. The envoy may be recalled by the accrediting State if it temporarily breaks off diplomatic relations for any grave cause. The Indian High Commissioner in the Union of South Africa was recalled in May 1946 as a mark of protest against the policy of racial discrimination adopted by South Africa against the people of Indian origin residing there, and the office of the High Commissioner was maintained in charge of a junior officer. The slender link in the diplomatic relation-

<sup>1.</sup> Sir Cecil J. B. Hurst: International Law, The Collected Papers, p. 120.

ship between India and South Africa was snapped by closing the office of the Indian High Commissioner in the Union from July 1, 1954. Such a recall is a sign of a rupture and shows the strained relations existing between the two countries.

Earlier in July 1953 the Government of India which had opened a legation in Lisbon to bring about direct negotiations with the Portuguese Government over the question of Goa, withdrew their representive from Lisbon and closed their legation there.

- Fulfilment of the object of the mission.—When the mission is for special purposes it comes to an end on the completion of the object. They are missions sent to conferences and congresses or representations at ceremonial functions.
- 3. Revolutionary change of government in either State.—With the change in the government on account of revolution, like changing a republic into a monarchy or a monarchy into a republic or deposing one sovereign and enthroning another, the envoy also ceases to represent his government and must receive a new letter of credence.
- 4. Death of the envoy.—On the death of the envoy, the mission comes to a close and the letter of credence loses its force. When a new envoy is appointed a fresh letter of credence has to be issued.
- 5. Death or abdication of the Head of either State.—Such a contingency also terminates the mission and the envoys at their posts must exchange new letters of credence. According to Oppenheim a constitutional change in the headship of republics like France and the United States of America, through death, abdication or expiration of office (where the President is the Head of the republic), terminates the missions sent and received by the former Head, and must necessitate new letters of credence. But when, as in Switzerland, a body of individuals is considered to be the Head of the republic, the death or abdication of the President, or the expiration of his term of office, does not terminate the missions, as no new letters of credence are necessary.
- 6. Return of the regular Minister to his post.—Where a minister has been accredited ad interim there is a termination of the legation when the permanent minister returns.
- 7. Change in the rank of the diplomatic agent.—There is a termination of the mission when the accredited diplomatic agent is promoted in rank without being transferred. A fresh letter of credence is necessary.
- 8. War between the accrediting and receiving States.—This brings about the end of the mission and the envoy and his staff and suite receive their passport.

Even apart from war a State may ask for the closure of the legation of another State on account of strained relations. The Government of India decided to ask for the closure of Portuguese legation in New Delhi with effect from 8, 1955, on account of the recalcitrant attitude adopted by Portuga with regard to the transfer of sovereignty of the Portuguese territories in Indian Union.

- 9. The extinction of State either by merger or annexation.—In such a case the diplomatic mission terminates.
- 10. Dismissal of the envoy by the sending or receiving State.— Dismissal of an envoy by the receiving State is the extreme step taken by it when its demands for the recall of the envoy are not complied with. There

may as well be differences between the sending State and the receiving State and passports may be given to the envoy by the receiving State marking his dismissal.

11. Demand of recall by the accredited State.—The receiving State may also demand the recall of an envoy if he has made himself obnoxious to the government of the country. The accrediting State has a right to ask for reasons leading to the demand of recall by the accredited State. If the reasons are inadequate the accrediting State may mark its sense of disapproval by leaving the embassy in charge of an inferior member of its diplomatic service. Such recall may also occasion a rupture of diplomatic intercourse.

Instances are not wanting where the accredited State has demanded recall of the envoy on the ground of offensive conduct towards the State or interference with its internal politics. In 1804 the Spanish envoy to U. S. A. was accused of bribing a newspaper to side his State in a dispute between the two countries on which his recall was demanded. In 1809 the United States wanted the recall of Jackson, the British Minister at Washington, for his alleged offensive remarks at a dinner. He was consequently recalled.

In October 1952, the Soviet Union asked U. S. A. to recall its ambassador in Moscow, Mr. George Kennan immediately for his hostile statements on the Soviet Union made to reporters in Berlin, which were in violation of recognized norms of International Law. The United States Government rejected the reasons put forward by Russia to declare Mr. Kennan "persona non grata." As a result of the exchange of notes it was decided that there was no way for Mr. Kennan to re-enter the Soviet Union after the Soviet Government's demand for recall and the Embassy Counsellor was left in charge of the embass y.

In October 1954 the Soviet secret police detained the wives of two American Embassy attaches in Moscow on the ground of hooliganism. The State Department strongly protested to the Soviet Foreign Office against the detention and mistreatment by Soviet secret police, whereupon the Soviet Government countered the protest demanding recall of one of the wives of the American Embassy attaches, Mrs. Someralatte. There was no precedent for a Government declaring the wife of a diplomat to be unacceptable.

- 12. Request for a Passport.—The request for a passport by the diplomatic agent on the ground of ill-treatment by the receiving State marks the termination of the diplomatic mission.
- 13. Expiration of letters of credence.—If a letter of credence is for a limited duration, the mission of the envoy comes to an end on the expiry of the period.

Formalities at Termination of Mission.—When the mission of an envoy terminates through his recall, he receives a letter of recall from the head of the State if he is an ambassador or minister or from his foreign minister if he is a Charge d'Affaires. On his departure he has a similar formal audience where the ambassador or minister presents his letter of recall to the Head of the receiving State and the Charge d'Affaires to the foreign minister.

International Terrorism and Protection of Diplomats.—Recent years have posed a substantial threat to the orderly and effective conduct of international affairs on account of the growth of international terrorism and passive encouragement from the interested quarters. The use or threat of violence against the person of diplomatic representatives as a coercive

device for the achievement of political or other objectives on the part of private individuals or groups is becoming common. Measures for enhancing the personal safety of diplomats and other persons entitled to special protection under International Law and national practice can have relevance only if such activities are condemned uniformly by all nations.

On February 20, 1973, there was an armed raid on the Indian High Commission in London by three Pakistani gunmen. Two persons were shot dead in an encounter with the police. The British Government expressed regret and sympathy over the incident to the Indian High Commission, but, instead of condemning the act, the Pakistani Charge d'Affaires conveyed his protest to the foreign office at the shooting down of two Pakistanis by the British police in the London outrage. The bodies of the two armed raiders were brought to Rawalpindi, where they were taken in a procession through the main street of the city. The Pakistan Government kept mum on the activities of the gang.

On March 1, 1973, the demonstrating students of Rawalpindi in protest set on fire the British Council Library there.

On March 1, 1973, the seven guerillas belonging to a group known as the 'Black September' struck rathlessly in the Sudanese capital of Khartoum by taking the U. S. ambassador, the Saudi ambassador and his family, two Jordanian Charge d'Affaires and several other diplomats hostage and demanded in exchange of their safety the release of a number of prisoners in three continents within 24 hours. Their demand not having been met, they killed the American ambassador and his Deputy and the Belgian Charge d'Affaires.

The horrific episode evoked world-wide condemnation. As observed by the U. N. Secretary-General, Dr. Kurt Waldheim, "the safety and immunity of diplomats is a basic principle of international law without which orderly relations between nations would not be possible. The appalling execution of two U. S. and one Belgian, diplomats by Palestinian commandoes in Khartoum, he observed, was one of the most savage incidents in living memory involving diplomatic personnel. President Nixon observed that this tragic event underscored once again that all nations of the world must take a firm stand against international terrorism. The U. S. Secretary of State, Mr. William P. Rogers, characterised it as a threat to human decency and international life. The Israeli Prime Minister Mrs. Golda Meir stated that this all-bloody murder at the hands of savage terrorists descreed the unreserved condemnation of people everywhere.

The matter with regard to terrorism has been engaging the attention of the United Nations. By a vote of 76 for, 34 against, and 16 abstentions, the Assembly's Legal Committee approved the resolution on December 11, 1972, expressing deep concern over acts of violence affecting innocent persons, but stressing at the same time that national liberation struggles were legitimate. The resolution called for the setting up of a study group to consider the whole problem of terrorism and its origin and submit a report to the next Assembly session.

### CHAPTER XXVII

#### CONSULS

States in the territory of other States, in addition to diplomatic agents. Their duty is to protect the commerce, navigation and other allied subjects of their country. They are sent as resident agents abroad for the purpose.

Hall defines consuls as persons appointed by a State to reside in foreign countries, and permitted by the Government of the latter to reside, for the purpose of partly watching over the interests of the State by which they are appointed, and partly of doing certain acts, on its behalf which are important to it or to its subjects, to which the foreign country is indifferent, it being either unaffected by them or affected only in a remote or indirect manner.

Their origin.-They have been in existence from long before the establishment of the permanent diplomatic missions. Their origin dates back to the Middle Ages when merchants from Italy, Spain and France settling down for trade in the Mediterranean coast used to elect one of their men as consul for settling their commercial disputes by arbitration. Later on the Muslim countries of the Mediterranean on account of the immigration of the communities of merchants adopted the consular system. In course of time and in consequence of treaties concluded between the Muslim princes and the home States of the merchants, consuls had the function of protecting the rights and privileges of the citizens of their home countries residing in the town. In the 15th century Italian consuls had full jurisdiction over the Italian merchants in the ports of England and the Netherlands. The consular system lessened in its importance in the 17th century on account of the introduction of permanent legation, and it was deprived of the privilege of its civil criminal jurisdiction. With the increase in commerce and navigation in the 19th century the consular practice gained momentum in the European States. Numerous treaties defining their character and functions were concluded between different States. The provisions of the treaties are now almost uniform, and the consular practice is governed by customary International Law. A number of States have enacted statutes regarding the duties of their consuls abroad, e.g., Consular Act passed by Great Britain in 1825.

Vienna Convention on Consular Relations, 1963.—Supplementing the work of the Vienna Conference on Diplomatic Intercourse and Immunities, 1961, the Conference on Consular Relations met at Vienna in 1963 and codified the limited privileges and immunities to which consuls are entitled regarding acts performed in their official capacity, their archives and correspondence with their home governments. The convention covers the whole field of status and activities of consuls. It stipulates the conditions under which a State having no diplomatic mission may, with the consent of the receiving State, authorise a consular officer to perform diplomatic acts, and act as a representative of the sending State to any inter-governmental organisation.

Grades of Consul.—There are various grades of consuls, viz., consulsgeneral, consul, vice-consul, consular agent and pro-consul. Consuls-general are appointed as the head of several consular districts or of one large district and have several consuls under them. Consuls coming next in rank are appointed for smaller districts or for towns and ports only. Vice-Consuls, as the name implies, are assistants of consuls-general and consuls. They are appointed according to the municipal laws of some States by the consul subject to the approval of the home State. Consular-agents are of the lowest rank, appointed by a consul-general or consul subject to the approval of the home Government. They exercise certain parts of the consular functions in certain towns or other places of the consul district. Pro-Consuls are appointed for a short period, viz., in the absence or illness of consul-general or consul and their appointment terminates with the return of the consul to duty. In the British Consular Service, they exercise the notarial functions of a consular officer. The Vienna Convention on Consular Relations, 1963, follows the customary classification.

Formerly, there also existed a practice to recognise consules missi, professional consuls or consuls of career who were sent by their government for the express purpose of attending to its interests. On the other hand, consules electi, enjoying an inferior rank and status, were chosen by the State from among merchants resident in the foreign country and they were not necessarily citizens of the State they represented.

Appointment of Consuls.—Consuls are appointed through a patent or commission termed Lettre de provision issued by the head of the appointing State and the receiving State issues a permit termed as exequatur which enables them to function in that State. The grant of exequatur confirms his commission.

According to Hall a State does not indirectly recognise a newly created state merely by appointing a consul to a district in it. Oppenheim is, however, of the view that if consuls are formally appointed and formally receive the exequatur on the part of the receiving State, then indirect recognition has been said to be involved.

Functions.—The functions of consuls are regulated primarily by the municipal law of each State. Since the exercise of their functions encroaches upon the jurisdiction of the local government, its consent is embodied in the form o consular treaties. Such functions may be summarised as below:

- I. Consuls look after the commercial interests of their State, advise their merchantmen and supervise their papers. They may arrest deserters from the vessels of their nation and are required to superintend the proceedings relating to salvage operations. They have to watch the execution of the commercial treaties entered into between their respective home States and the States which have admitted them. They look after the commercial interests of the citizens of the country they represent. They also attend to various other miscellaneous work, e.g., the administration of the estates of subjects dying intestate, settling disputes between captains and crews, receiving reports from masters of vessels of their State, settling questions of damages suffered at sea by the vessels of their country, etc. They are also expected to apprise their Government of the state of commerce, industry and agriculture of the State in which they happen to live. They have also to advise the merchants and manufacturers of their home States in any matter concerning the protection of their commercial interests.
- 2. Gonsuls have also to protect the subjects of their home State—a task similar to that of a diplomatic agent. They have to keep a register showing the names and addresses of the citizens of their own State residing in a consular district. They also register marriages, births and deaths and take

<sup>1.</sup> Art. 9.

<sup>41</sup> 

charge of wills. They make out passports and render assistance to paupers and the sick, and to litigants before the Court. They send home shipwrecked or destitute persons. They administer property of their nationals if they die abroad.

- 3. Consuls have also to supervise the navigation of the appointing States. They have to keep a watch over their merchantmen, sailing under the flag of their home States, to inspect them on their arrival and departure, to assist vessels in distress and to settle disputes between the vessel, master and their crew.
- 4. They also perform notarial functions such as attesting and legalizing signatures, recording depositions of witnesses, captains and crews of vessels of their own country and administering oaths, registering marriages, taking charge of wills, registering births and deaths and legalising adoption. They may appear personally on behalf of the absent heirs or creditors of deceased nationals of their own state. The Vienna Convention details their functions in Art. 5 in great detail.

Privileges.—Consuls are not diplomatic agents and as such they are not immune from local jurisdiction, unless agreed to by treaty. They, hewever, enjoy certain privileges by courtesy or by special conventions between particula States. According to the generally accepted practice they are regarded immune from local, civil—and also perhaps criminal—proceedings in respect of acts performed in their official capacity. Even in respect of criminal matters they are proceeded with only for serious crimes.

Their official papers and archives are exempt from seizure according to usage. Art. 41 of the Vienna Convention of 1963 provides that consular officers shall not be liable to arrest or detention pending trial except in the case of a grave crime and pursuant to a decision by the competent judicial authority. In the case of criminal proceedings for lesser offences special consideration is to be shown to the consul so as to hamper the exercise of his consular functions as little as possible. By commercial and consular treaties they are often exempted from local rates and direct personal taxes, such as income-tax and taxes upon other personal property, but are subject to the usual taxes on resa property and their private business. They are exempted from service on juric. The modern tendency is to accord them by treaty greater rights than they havel enjoyed hitherto under International Law.

Som etimes consuls are also charged with the tasks assigned to diplomatic representatives, but this does not automatically invest them with the privileges of envoys if the same are not provided for by treaties between the home State and the State in which they reside.

Unlike that of an ambassador, the office of a consul does not terminate on the change in headship of a State or with the death of the sovereign of either State.

According to Starke, "the modern tendency of states is to amalgamate their diplomatic and consular services, and it is a matter of frequent occurrence to find representatives of States occupying, interchangeably or concurrently, diplomatic and consular posts. Under the impact of this tendency, the present differences between diplomatic and consular privileges may gradually be narrowed." The Vienna Convention on Diplomatic Relations, 1961, also laid down that nothing in the Convention should be construed as preventing the diplomatic mission from performing consular functions. The Vienna

<sup>1.</sup> Starke: An Introduction to International Law, 7th Ed., p. 393.

Convention on Consular Relations, 1963, lists in Arts. 28-39 their privileges and immunities in detail.

As regards the obligation of the members of a consular post to appear in person as witnesses in court, Art. 14 of the Vienna Convention provides that they may be called upon to attend as witnesses in the course of judicial or administrative proceedings, except in respect to matters connected with the exercise of their functions, with the qualification that the authority requiring the evidence of a consular officer should avoid interference with the performance of his functions.

Termination of Consular Office.—It comes to an end on any of the following happenings:

- (1) Death of consul;
- (2) Withdrawal of the exequatur;
- (3) Recall or dismissal of the consul.
- (4) Declaration of war between the sending and receiving States.

The death of the sovereign or head of either State, as said earlier, does not terminate the consular office.

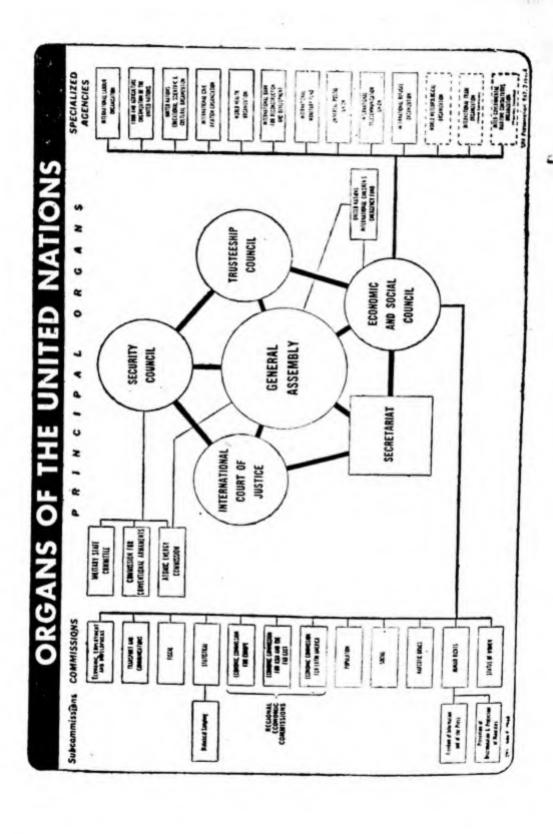
A case of withdrawal of consuls happened when the Government of India withdrew the exequatur of the Portuguese Consul-General and Consul in Bombay with effect from July 31, 1954, as a countermeasure to Portugal's demand earlier for the withdrawal of the Indian Consul-General at Goa and Consul at Marmugao on account of certain imputations cast against the Indian representatives in Goa. The Government of India finally withdrew their Consulate-General from Goa and asked for the closure of the Portuguese Consulate-General in Bombay and the the honorary Consulates in Calcutta and Madras from September 1, 1955, in consequence of wanton and brutal exercise of force against unarmed and non-violent Indian Satyagrahis who entered Goa on August 15, 1955.

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# INTERNATIONAL TRANSACTIONS CHAPTER XXVIII

#### 1. TREATIES

into between two or more States wherely they undertake to carry out obligations imposed on each of them.

International treaties, according to Oppenheim, are agreements, of a contractual character, between States or organisations of States, creating legal rights and obligations between the parties.<sup>1</sup>

A treaty, according to Starke, is an agreement whereby two or more States establish or seek to establish a relationship between themselves governed by International Law. So long as an agreement between States is attested, any kind of instrument or document, or any oral exchange between States involving undertakings may constitute a treaty, irrespective of the form or circumstances of its conclusion.<sup>2</sup>

In the Harvard Draft Convention on the Law of Treaties the term "treaty"—called as elastic as Jurisprudence by someone—has been limited to mean "a formal instrument of agreement by which two or more States establish or seek to establish a relation under International Law between themselves." This would imply that it does not include "an agreement effected by exchange of notes," a view difficult to justify.

Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.<sup>3</sup>

Treaties, as said elsewhere, form an important source of International Law. They may determine legal relations between parties on a footing different from the accepted customary rules of nations or they may supplement, modify or define the pre-existing International Law.

Other documents.—Various attempts have been made to classify treaties but on account of the enormity of their kinds, the classification has not

been very successful.

At the outset there are various other documents which, though very much akin to treaties, are, strictly speaking, not by themselves treaties. They are proposals, proces-verbol protocol, memoire, exchange of notes, modus vivendi, Final Act, deelaration, convention, etc. etc. A proposal is a document embodying an offer by one State to another. A note verbal is an unsigned document containing a summary of conversations or of events and the like. A proces-verbal is a document containing the official record or minutes of the proceedings of a conference or the terms of some agreement. A protocol denotes a supplementary instrument to a treaty or convention. It is an international agreement but of a supplementary nature. The terms proces-verbal and protocol are often used interchangeably, and in that sense they denote a document containing the proceedings of an international conference, signed by the delegates, to serve as the basis for the final instrument to be drawn up subsequently. A memoire (or memorandum is a document containing an account of the events. An exchange of notes records informamly certain understandings reached by States among themselves

Oppenheim: International Law, Vol. 1, 8th Ed. p. 877.
 Starke: An Introduction to International Law, 7th Ed. p. 197.
 Vienna Convention on the Law of Treaties, 1969, Art 1 (a)

A modus vivendi records an international agreement of a purely temporary nature which is in course of time replaced by a permanent arrangement. A Final Act is the title of the instrument that records the winding up proceedings of a conference summoned to conclude a convention. It is "a formal statement or summary of the proceedings of a congress or conference, enumerating the treaties or conventions drawn up as a result of its deliberations." A General Act is a treaty of a formal or informal character, the term having been used by the League of Nations in the case of the General Act of Arbitration for the Pacific Settlement of International Disputes adopted by the Assembly in 1928. The term declaration may mean a treaty proper, an informal instrument appended to a treaty or a convention explaining the provisions of the treaty. Declaration may or may not be subject to ratification. The term convention denotes an agreement between parties evidenced by a formal instrument of multilateral character.

Kinds of Treaties.—Oppenheim classifies treaties into law making treaties which are concluded for the purpose of laying down general rules of conduct among a considerable number of States, and treaties concluded for any other purpose.

Treaties classified according to subject-matter are treaties of alliance, treaties of guarantee, treaties of commerce, treaties neutralising a State, etc.

Vattel classifies treaties as equal and unequal and real and personal.

Real treaties relate solely to the subject-matter of the convention independently of the persons of the contracting parties. They continue to bind the state irrespective of the changes in the persons of its rulers. Personal treaties relate to the persons of the contracting parties and expire on the death of the King.

The treaties may be distinguished as unilateral and bilateral, accordingly as they bind one party or both the parties. There are also multilateral treaties which bind more than two States as parties. Such treaties may be either political or non-political. There are also law-making treaties, e. g., the Pact of Paris, the Covenant of the League of Nations and the Charter of the United Nations.

Treatics classified according to objects are political, com ercial, social and treaties of guarantee, neutrality, cession or extradition.

There are also transitory and permanent treaties.

The most perfect classification is to be found in that given by McNair, [British Year Book of International Law (1930)], which is as follows:

- (d) Treaties having the character of conveyances;
- (b) Treaties having the character of contracts;
- (c) Law-making Treaties which may sub-divide into :-
  - (1) Treaties creating constitutional law, e.g, the Statutes of the Permanent Court of International Justice (now the International Court of Justice);
- 1. Of. Jackson: "A Manual of Internation | Law," p. 47.

- (2) Purc Law-making Treaties, e. g., the several Labour Conventions negotiated by the International Labour Organisation;
- (d) Treaties akin to Charters of Incorporaton, e. g., Treaties which established the Universal Postal Union, 1874.

Power to enter into treaties.—A sovereign State, which has not parted with any portion of its sovereignty either by confederation or treaty of alliance, possesses full treaty-making power. The power of semi-sovereign States to enter into treaties with other States is limited and depends upon the nature of freedom that they enjoy. In the case of a Federation the constitution defines the powers of the member States to enter into treaties with other sovereign States. In the case of a vassal State or the protectorate, the power of the vassal State or protectorate to enter into treaties with foreign States depends upon the freedom allowed to them by the suzerain or the protecting State.

It was observed by the Permanent Court of International Justice in the case of the S. S. Wimbledon that "the capacity of entering into international engagements is an attribute of State sovereignty."

Treaty-making power of the Dominions.—There is now no denying the fact that the various dominions forming part of the Commonwealth possess the capacity to enter into treaties. But such competence is hedged in by certain self-imposed conditions. In the first place, no treaty is to be negotiated by any of the Governments of the Commonwealth without the consideration of its possible effects on other parts of the Commonwealth and on the Commonwealth as a whole. In the second place, in accordance with the Resolutions of the Imperial Conferences of 1923, 1926 and 1940 all the members of the Commonwealth have to be informed beforehand so that if any Government considers that its interests might be affected it may express its views or participate in the negotiations. The Commonwealth Prime Ministers' Conference held in London in October 1948 went to the length of deciding that members may consult with one another in formulating policies.

Treaty-making power of U. N.—There are a number of stipulations contained in the Charter of the United Nations which lead to the conclusion that the Organization can conclude treaties. It was clearly held by the International Court of Justice In the Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) that the United Nations has a sufficient international personality to permit it to present a claim for damages in respect of injuries done to its servants in the course of their duties. The Court further observed:

".....the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, and that its legal personality and rights and duties are the same as those of a State. Still less is the same thing as saying that it is "a super-State", whatever that expression may mean... What it does mean is that it is a subject of International Law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims."

It must, however, be clearly understood that this treaty-making power of the United Nations cannot be treated as on par with that of States.

Article 43 of the Charter, which empowers the Security Council to conclude a treaty with the members of the United Nations to enable them to contribute to the maintenance of international peace and security, on its call and in

<sup>1.</sup> I. C. J. Reports, 1949 P. 174.

accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. This conclusion is further reinforced by the provisions contained in Article 24 whereby the members have conferred on the Security Council primary responsibility for the maintenance of international peace and security and have further agreed that in carrying out its duties the Security Council acts on their behalf.

Article 63 lends support to the above view by providing that the Economic and Social Council may enter into agreements with the various specialised agencies, established by inter-governmental agreement, and define the terms on which the agency concerned shall be brought into relationship with the United Nations.

With regard to the trusteeship agreements the relevant provisions are contained in Chapter XII. Article 77 lays down that the trusteeship system shall apply to such territories as may be placed thereunder by means of trusteeship agreements and it will be a matter for subsequent agreement as to which territories will be brought under the trusteeship system and upon what terms. That the United Nation is to have a supervisory role in the administration of trust territories admits of no doubt. Clive Parry observes that "the result of the consideration of Chapter XII of the Charter does not go beyond the conclusion that the 'trusteeship agreements' of which it speaks are instruments sin generis. Whatever their claim to be designated 'treaties', they are without doubt acts in the law, creative of rights and duties."

There then remains to consider agreement relating to privileges and immunities. The International Court of Justice in The Reparation for Injuries Suffered in the Service of the United Nations referring to the capacity of the Organisation to enjoy rights and obligations under treaty as provided in between the Organization and its members and that the Organization had a large measure of international personality and capacity to operate upon an international plane.

Mutual Consent of the Contracting Parties.—Since a treaty is an agreement, there should be an accord of will between the contracting parties manifested by signs, spoken or written words. There must be mutual consent of the parties. Mere proposals made by one party and not accepted by the other are not binding upon the proposer. Duress does not invalidate consent as it does in private law of contract. There must further be capacity on both sides and the object must be legal.

Contracts and Treaties.—In Municipal Law contracts are agreements which are enforceable at law having been entered into between citizens of a State. International treaties, on the other hand, are agreements entered into between States for the purpose of carrying out the various transactions that emanate on account of international relationship existing between them. As to the legal character or binding force of international treaties, whatever opinion of Oppenheim who bases it on the customary rule of International Law. He says that many writers find the binding force of treaties in the Law of Nature, others to religious and moral principles, others in the self-restraint

p. 127.

1. Clive Parry: Article in British Year Book of International Law, 1949, p. 108 at

329

exercised by a State in becoming a party to a treaty and some others ascribe it to the will of the contracting parties, but the correct answer is probably that treaties are legally binding because there exists a customary rule of International Law that treaties are binding.

In private contracts, there must be a free offer and a free acceptance, besides valuable consideration. Accordingly in Municipal Law freedom of consent is essential to the validity of every agreement, and contracts entered into under duress or forced by threats or by violence are not linding upon the parties thereto. In International Law duresshas to some extent been recognized the conclusion of treaties. At the end of the war, the victor nation is in a position to dictate terms, which are accepted by the vanquished State. By virtue of the unenviable position of the vanquished State, any treaty signed by it will be tainted with some amount of coercion. Even Hall shares the view that "in International Law force and intimidation are permitted means of obtaining redress for wrongs, and it is impossible to look upon permitted means as vitiating the agreement, made in consequence of their use, by which redress is provided for." To the same effect are the observations of Wheaton : ".....the welfare of society requires that the engagement entered into by a nation under such duress as is implied by the defeat of its military forces, the distress of its people, and the occupation of its territories by an enemy, should be held binding; for if they were not, wars could only be terminated by the utter subjugation and ruin of the weaker party. Nor does inadequacy of consideration, or inequality in the conditions of a treaty between nations, such as might be sufficient to set aside a contract as between private individuals on the ground of gross inequality or enormous lesion, form a sufficient reason for refusing to execute the treaty."

The Treaty of Versailles is a glaring example where conditions were imposed upon Germany without any pretext or excuse of entering into a treaty. The German Republic was obliged to accept the oncrous terms and conditions of the Versailles Treaty-which in fact bore the seeds of the Second World War-by the mere overwhelming force of the Allied and Associated Govern-

Apart from the above, it has to be emphasized that treaty concluded as a result of violence or intimidation exercised personally against the sovereign or the diplomatic agent will not be binding. Lord Birkenhead observed that "to introduce an armed force into the Conference Chamber for terrorising a negotiator into submission would invalidate the agreement extorted from

Then, like contracts under Municipal Law, treaties are not binding if the consent was based upon material error or given on account of fraud or

After the establishment of the United Nations Organization there should now be little chance of restricting the freedom of action of the States in regard to conclusion of treaties, by the use of coercion, intimidation or force.

Treaties inconsistent with the Charter and Immoral Treaties .-Article 103 of the Charter of the United Nations lays down that the obligations of the members of the United Nations under the Charter shall prevail over their obligations under any other international agreement in case of any conflict. Accordingly, treaty obligations so as far as they are inconsistent with the principles of the Charter will not be valid. "It is plain, therefore," observes Svarlien, "that the Charter of the United Nations constitutes a 'higher law', limiting to a certain extent the contractual capacity of those States who arc members of the Organization."1

It is recognized by the usage of International Law that immoral obligations imposed by treaties or treaties opposed to public morality are not binding on the parties.

Vienna Convention on the Law of Treaties .- A Convention on the Law of Treaties was adopted by the U.N. Conference in Vienna in May 1969, by 79 votes to 1, with 19 abstentions. The Convention is a major work of codification and progressive development of the law of treaties and is the result of the efforts of the International Law Commission covering a period of about 20 years. It broadly reflects existing international law and practice on the subject of treaties.

The final text of the Convention consists of 85 articles, is divided in seven parts and covers the whole range of topics falling within the law of treaties. Article 1 (a) (contained in the Introductory Part of the Convention comprising Arts. 1-5) defines the term 'treaty' as an international agreement concluded between States in written form and governed by International Law. The Convention does not cover treatics between States and international organizations or between two or more international organizations. As regards capacity to enter into treaties, Art. 6 provides that every State possesses capacity to conclude treaties. Part II of the Convention deals with conclusion and entry into force of treaties (including reservations) (Arts. 6-25); Part III with the observance, application and interpretation of treaties (Arts. 26-38); Par IV with the amendment and modification of treaties (Arts. 39-41); Part V with the invalidity, termination and suspension of the operation of treaties (Arts. 42-72); Part VI with certain miscellaneous provisions ( \rts. 73-75); Part VII with depositaries, notifications, corrections and registration (Arts. 76-80); and Part VIII with final provisions, viz., signature, ratification, accession, etc. (Arts. 81-85).

The Vienna Convention on the Law of Treaties, termed by Richard D, Kearney and Robert E. Dalton as 'the treaty on treaties' "does not approach The international legislative process remains much too primitive a merchanism to produce an approach to perfection. This convention is, however, in an unspectacular and carthbound way, a giant step for mankind toward a world in which the rule of law will be not a dream but a reality."

Constitutional Requirements .- In the case of sovereign States the power of entering into treatics rests with the heads of States or their representatives. In case they violate the constitutional limitation imposed by the municipal laws of their respective States, the treaties are not binding on them. In some States like the United Kingdom the making of a treaty is an executive act while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.

1. Svarlien: Introduction to the Law of Nations, pp. 270-271.

2. The General Assembly has by its resolution of November 19, 1969, referred the topic relating to treaties between two or more international organizations to the International Law Commission for its study.

3. American Journal of International Law, Vol. 64 (1970): The Treaties on Treaties,

by Richard D. Kearney and Robert E. Dalton, pp. 495, 561.

Conclusion of Treaties.—There is no specific form for the conclusion of treaties. An oral agreement between representatives of the States charged with the task of conducting negotiations and empowered to bind their respective countries is sufficient to have binding effect if it is the intention of the representatives to conclude a legally binding transaction. The enormous importance of the issues involved in such agreements however necessitates the compliance of formal requirements and reducing the agreements into a document.

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification acceptance, approval or accession, or by any other means if so agreed.

The various steps towards the conclusion of a treaty are:

- 1. Accrediting of representatives.—Each of the State conducting negotiation appoints a representative or plenipotentiary for this purpose. He is provided with an instrument given by the Minister for Foreign Affairs showing his authority to conduct such negotiations, which is known as the Full Powers. According to the Vienna Convention on the Law of Treaties, "full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty. Such instrument when signed by the king and scaled with the Great Scal is known as the "Special Full Powers."
- 2. Negotiation.—The two plenipoteniaries exchange their full powers or a copy thereof before entering upon their task. They then proceed with negotiations. In the case of bilateral treaties negotiations are conducted through pourparlers but they take the shape of a diplomatic conference when a multilateral treaty is to be adopted.
- 3. Signature.—When the final draft of a treaty is drawn up, the instrument is ready for signature. The signature is affixed at a formal closing session. A treaty generally comes into force on signature by plenipotentiaries of the contracting States unless the States desire to subject it to ratification. Treaties and conventions are generally always sealed.
- 4. Ratification.—It is an act of adopting an international treaty by the parties thereto. In other words, ratification implies the confirmation of treaty entered into by the representatives of the different States. So long as a treaty is not ratified Ly proper authority under the constitution of the country, it lacks the formal validity or sanction. Although treaties are confirmed subsequently, legal effects are held to date from the moment of the signature. The time lag between the signature and actual ratification is allowed to the States, who are parties to the treaty, to pender over the matter and refuse to confirm or ratify the agreement for any valid reasons. This also affords them an opportunity to obtain the approval of Parliament should it be necessary to do so or otherwise consult public opinion.

The reasons for refusal to ratify the treaty must not, however, be arbitrary or capricious. Ratification of a treaty may be withheld on the following grounds:

<sup>1.</sup> Art. 11, Vienna Convention on Law of Treaties, 1969.

- (i) if the representative or plenipotentiary has exceeded his powers;
- (ii) if any deceit as to matters of fact has been practised upon him;
- (iii) if the performance of treaty obligations becomes impossible;
- (iv) if there has not been consensus ad idem, i. e., there has not been agreement as to the same thing.

According to Brierly, there is no legal bar nor even a moral duty on a State to ratify a treaty signed by its own plenipotentiaries; it can only be said that refusal is a serious step which ought not to be taken lightly.

As regards the form of ratification, as said above, there is no express rule. It may be made expressly or tacitly. Ratification is often made with reservations. Such reservations require the formal consent of the other States who are parties to the treaty before the treaty can be said to have binding effect.

Ratification subject to reservations in bilateral treaty.—As said above, ratification is an act of adopting an international treaty by the parties thereto. In other words, ratification implies the confirmation of the treaty entered into by the representatives of the different States. Ratification, subject to reservations, however, alters the character of the treaty. According to the Vienna Convention on the Law of Treaties, 1969, reservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. As Oppenheim observes: "A reservation is upon analysis the refusal of an offer and the making of a fresh offer. Therefore in principle it seems necessary that the other party should assent to the reservation either expressly or by implication arising from acquiescence, and the preponderance of practice accords with this view."

Prior to 1950, the practice of States about reservation leaned in favour of the 'unanimity rule' which required the acceptance, express or tacit, of all States having a legitimate interest in a multilateral Convention; and a State with a reservation clause could not be a party to the Convention unless accepted by others. In its Advisory Opinion on the Reservations to the Genocide Convention Case' however, the majority of the Judges constituting the International Court of Justice set aside the orthodox view and gave its opinion that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise that State cannot be regarded as being a party to the Convention. They found that the unanimity principle had not been transferred into a rule of law.

The International Law Commission formulated the reservation clause by stating that a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases where the treaty contains no provisions regarding reservations, the

reservation is incompatible with the object and purpose of the treaty. The clause was adopted by the Vienna Convention on the Law of Treaties (Art. 19); except that an U. S. S. R. amendment based on the traditional Soviet doctrine that "the formulation of a reservation is an act of State sovereignty and does not require acceptance by other States", was also accepted. The amendment incorporated into the Convention provides that "an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;" [Art: 20 (4, (b)]. Paragraph 5 of Art. 20 further provides that unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Multilateral conventions. - In the case of multilateral conventions of a lawmaking character, which lay down certain general principles of conduct, the rights of the parties are not very meticulously defined. Therefore the same general principles which relate to bilateral treaties are not quite applicable to the multilateral conventions. It was observed by the International Court of Justice in its Advisery Opinion On the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (I. C. J. Reports, 1951, p, 29) that a State making a reservation which is being objected to by one or more of the parties to the Convention but not by others, nevertheless remains a party to the Convention if the reservation is compatible with the object and purpose of the Convention; that if a party to the treaty objects to a reservation which it considers to be incompatible with the object and purpose of the treaty, it can consider the State not to be a party to the treaty; and reserving that in the case of a party which accepts the reservation as being compatible with the object and purpose of the treaty, it can consider the reserving State to be a party to the treaty.

5. Accession and Adhesion.—A third State can become a party to an already existing treaty by means of accession. This may be brought about by formal entrance of the third State with the consent of the original contracting parties or, as Oppenheim observes, by becoming "a party to a treaty between other States for the purpose of guaranteeing its due performance" whereby the acceding State also becomes a party to the treaty.

Adhesion denotes the entrance of a third State into an existing treaty with regard to certain stipulations or certain principles only embodied in the treaty.

Oppenheim is of the view that the distinction between accession and adhesion is one made in theory, to which practice does not frequently correspond.

- 9. Coming into force of treaties.—The treaty, unless where ratification is necessary, comes into force on the date of signature. In case of ratification the treaty comes into force after the exchange or desposit of ratifications by the States signatories. Multilateral treaties come into operation on the deposit of a prescribed number of ratifications and accessions.
- 7. Registration.—After the treaty has been so ratified, it has to be registered at the headquarters of the international organization. Article 18 of the Convenant of the League provided that every treaty or international engage-

ment should be registered with the secretariat of the League and published by it as soon as possible. No such treaty or international engagement was binding on any State until it was so registered. This meant that in case of any dispute the treaty could not be relied upon if it was not registered. To the same effect are the provisions in the United Nations Charter. Article 102 of the Charter reads:

- "(1) Every treaty and every international agreement entered into by any member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
- "(2) No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph (1) of this Article may invoke that treaty or agreement before any organ of the United Nations."

The second part of Article 102 clearly prohibits States to bring before the bar of world opinion any secret treaty. The effect of non-registration is, however, limited to this extent that parties to the treaty cannot invoke it before any organ of the United Nations.

8. Incorporation of treaty into State law—The final stage of the treaty is its actual incorporation in the municipal laws of the contracting States where such incorporation is necessary in order to assume a binding character.

Invalid Treaties.—In accordance with International Law treaties may be deemed invalid on any of the following grounds:

- (1) Where the object of the treaty is illegal. Treaties stipulating immoral obligations are void ab initio.
- (2) Where fraud or misrepresentation has been practised on the parties to the treaty in the conclusion of the same.
- (3) Where the treaty has been concluded by intimidation or coercion or by terrorising the negotiator.
- (4) Where there is an error produced by fraud in the conclusion of the treaty.
- (5) Where the treaty provides for obligations the performance of which is impossible.
- (6) Where there is an incapacity from status of the contracting parties to the treaty. A mandatory territory, for example, has no treaty making power.
- (7) Where treaties are concluded in violation of the principles of International Law or in derogation of the principles of the Charter.

The Vienna Convention on the Law of Treaties referred in particular to such grounds of invalidity as error in a treaty relating to a fact or situation assumed by the complaining State to exist at the time of the treaty's conclusion and forming an essential basis of its consent to be bound (Art. 48), of a representative of a representative of a State (Art. 50), coercion of force (Art. 52) and, above all, conflict with an existing or emerging peremptory norm of general inter ationcal law (Articles 53 and 64 commenly referred to as the jus cogens articles).

Effect of Treaties on Third Parties.—It was observed by the Permanent Court of International Justice in the Case concerning certain German Interests in Polish Upper Silesia1 that "a treaty only creates law as between the States which are parties to it : in case of doubt, no rights can be deduced from it in favour of third States." But the Court observed in the Case of the Free Lones of Upper Savoy and the District of Gex2 that "it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such." Kelsen cites the following instances of treaties which confer rights on third parties :

- (1) Treaties by which State servitudes are established by creating rights for the successor to the dominant State though not a contracting party to the treaty.
- (2) Treaties establishing the protection of minorities and opening to States that are not contracting parties to the treaty the possibility of invoking a court against violations of the treaty stipulations, such as the treaties concluded by the Principal Allied and Associated Powers with Poland, signed on June 28, 1919, and with Czechoslovakia, signed on September 10, 1919.
- (3) Treaties concluded between two States concerning a canal or a strait stipulating that the canal or the strait shall be open to vessels of all nations, as for instance, the Hay-Pauncefote Treaty between Great Britain and the United States of 1901.
- (4) The Peace Treaty of Versailles contains in Article 109 provisions in favour of Denmark; in Article 116, provisions in favour of Russia; and in Article 358, provisions in favour of Switzerland, although all the three States were not contracting parties to the treaty.
- (5) The Peace I reaty with Italy signed on February 10, 1947) contains in Article 76 provisions in favour of any of the United Nations which broke off diplomatic relations with Italy and which took action in co-operation with the Allied and Associated Powers," without being contracting parties to the treaty.3

Pacta Sunt Servanda.-It is a doctrine borrowed from the Roman Law and has been adopted as a principle governing treaties in International Law. According to this dectrine, the parties to a treaty are bound to observe its terms in good faith. The observance of understandings, agreements and treaties between nations, of served Cordell Hull, constitutes the foundation of international order. It is just that States taking over certain obligations must perform them. According to Fenwick: "Philos phers, theologians and jurists have recognized with unanimity that unless the pledged word of a State could be relied upon, the relations of the entire international community would be imperilled and law itself would disappear."

The Permanent Court of International Justice has consistently held that the provisions of municipal law cannot prevail over those of treaty. That Court observed in the case concerning the Treatment of Polish Nationals in Danzig : "A State cannot adduce as against another State its own constitution with a view to evading obligation incumbent upon it under International Law or treaties in force." Again it was observed in the Free Zone case: "It is certain

P. C.I.J. Series A. No. 7.

P. C. I. J. Series \/B No. 46, p. 170.
 Hans Kelsen: Principles of International Law, pp. 349-350.

that France cannot rely on her own legislation to limit the scope of international obligations." "The same view was repeated in the Greco-Bulgarian Communities by the Permanent Court of International Justice in its advisory opinion: It is a generally accepted principle of International Law that in the relations between Powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."

In this connection the observations of Lauterpacht are pertinent. He says: "The rule that compacts must be kept is certainly one of the bases of the legal relations between the members of any community. But at the same time the notion that in certain cases the law will refuse to continue to give effect to originally valid contracts is common to all systems of jurisprudence."

Article 26 of the Vienna Convention on the Law of Treaties, 1969, specifically embodies the doctrine of pacta sunt servanda when it lays down that every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Amendment or Modification of Treaties.—The subject of amendment or modification of treaties may be studied under the two heads, viz., hilateral and multilateral treaties.

Bilateral Treaties.—As regards bilateral treaties, the traditional principle enshrined in Art. 39 of the Vienna Convention on the Law of Treaties, 1969, provides that a treaty may be amended by agreement between the parties. The rules laid down in Part II of the Convention apply to such an agreement, unless the treaty itself lays down the procedure for amendment or revision of the treaty.

A difficulty arises where the principles relating to revision of treaties create rights for third States. This is now specifically provided in Art. 36 of the Vienna Convention on the Law of Treaties:

36. "1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides......"

Under customary law no benefit accrues to a fourth State which is a State that draws benefit indirectly out of the right created in favour of a third State.

Multilateral Treaties.—Article 40 of the Vienna Convention on the law of Treaties provides the rule with regard to amendment of multilateral treaties as under:

- 40. "1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.
- 2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:
  - (a) the decision as to the action to be taken in regard to such proposal;
  - (b) the negotiation and conclusion of any agreement for the amendment of the treaty.
  - 1. H. Lauterpacht. The Function of Law in the International Community, p. 273.

- Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.
- 4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement;...
- 5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
  - (a) be considered as a party to the treaty as amended; and
  - (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement."

As regards agreements to modify multilateral treatics between certain of the parties only, Art. 41 of the Convention provides:

- 41, '1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
  - a) the possibility of such a modification is provided for by the treaty; or
  - (b) the modification in question is not prohibited by the treaty; and
    - (i) does not affect the enj yment by the other parties of their rights under the treaty or the performance of the obligations;
    - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
- 2. Unless in a case falling under para. I (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."

Amendment when applicable to all the Parties to a Treaty.—The principles enunciated in the Convention are subject to the express provisions of a treaty, whether bilateral or multilateral. In certain cases the treaties may themselves provide for their revision otherwise than by unanimous consent; e.g., Art. 108 of the Charter of the United Nations permits amendments to the Charter which shall be binding on all members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the members of the United Nations, including all the permanent members of the Security Council.

Termination of treaties.—Treaties may terminate on any of the

- (a) On expiry of the specified period for which a treaty was concluded.
- (iv) Where the main object of the treaty is fulfilled: In case of treaties imposing no continuing obligations, they cease to operate on the fulfilment of the object.

- (c) By mutual consent of the parties to the treaty. The parties to a treaty are its masters and, therefore, International Law does not lay any difficulties in their way if, by mutual consent, they wish to terminate the treaty, or the treaty grants a unilateral right of denunciation to any or all of the parties thereto.
- (d) Non-performance of certain essential conditions: If the treaty grants a unilateral right of denunciation to one or all of the consenting States in case of failure of certain essential conditions, the treaty comes to an end on the happening of such a contingency.
  - (c) When the obligations of the treaty become incompatible with the Charter of the United Nations: Article 103 specifically provides that in the event of a conflict between the obligations of the members of the United Nations and their obligations under any other agreement, their obligations under the Charter shall prevail.
- (f) When a war breaks out between the contracting parties: The modern view, however, is that the outbreak of war does not necessarily bring a treaty to an end. It was observed by Cardozo, J. in Techt v. Hughes¹ that provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected.
  - (g) When one of the contracting parties is extinguished by annexation or merger: The treaty between U. S. A. and Tripoli ceased to exist when the latter was annexed by Italy in 1912.
  - (h) Force Majeure and Impossibility of Performance : In the Russian Indemnity Case (1912) between Russia and Turkey, the Permanent Court of Arbitration held that the exception of vis major could be pleaded in international as well as in private law. tional law must adapt itself to political necessities. agreeing with the contention of Turkey that the obligation of a State to carry out treaties must give way if the very existence of the State should be in danger and the observance of the international duty is self-destructive on the part of the State concerned, Russia argued that Turkey had from 1881 to 1902 been faced with financial difficulties of the utmost seriousness and yet during that period Turkey was able to obtain loans at favourable rates to redeem other loans and to pay off a large part of its public debt. The Court agreed with this contention of Russia and held that the existence of the State of Turkey was not imperilled by the enforcement of the payment of a small sum of about six million francs due to the Russian claimants or seriously compromised its internal or external situation. exception of force majeure raised by Turkey was accordingly negatived.

The rule with regard to supervening impossibility of performance is enshrined in Art. 61 of the Vienna Convention on the Law of Treaties, which reads as under:

<sup>1. (1920) 229</sup> N. Y. 222.

<sup>2.</sup> Permanent Court of Arbitration (1912) No. XI.

- 61. "1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.
- 2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty."
  - (i) The doctrine of rebus sie stantibus: The doctrine connotes that when the existence or the development of a State stands in unavoidable conflict with its treaty obligations, the latter must give way for self-preservation and development in accordance with the growth and the vital requirements of the nation. Professor Hall agreeing with the doctrine observes:
  - "A treaty, therefore, becomes voidable so soon as it is dangerous to the life or incompatible with the independence of a State, provided that its injurious effects are not intended by the two contracting parties at the time of its conclusion."

In this connection Lawrence also observes that "International Law certainly does not give a right of veto on political progress to any reactionary member of the family of nations who can discover in its archives some obsolute treaty, on the fulfilment of whose stipulations, it insists against the wishes of all other signatory powers."

Thus every treaty implies a condition that the contracting party should have the right to demand release from the obligations imposed by the treaty shoeld, due to change of circumstances, the continued existence of the State as an international person be threatened.

In the case of the Russian denunciation of that part of the Treaty of Paris of 1.56 which related to the neutralization of Black Sea and to the restriction imposed upon Russia in respect of keeping armed vessels in that sea, the powers recognised as far back as in the year 1870 the right to invoke the clause rebus sic stantibus as a ground for the extinction of treaties, but it was observed that Russia could not unilaterally denounce a treaty.

In the case of Nationality Decrees in Tunis and Morocco<sup>1</sup> (1923), which related to the effect of the Tunisian and French Nationality Decrees of November 8, 1921, conferring French nationality and liability to military whom was there, it was contended before the Permanent Court of International Morocco (1856) and Tunis (1875) for an indefinite period, that is to say, in clausula rebus sic stantibus owing to a new situation having arisen and that the decrees which made all persons born within the territory citizens of Tunis The Gourt held that in consequence of the treaties the matter was not solely

<sup>1.</sup> Permanent Court of International Justice (1923) Series B. No. 4.

within the domestic jurisdiction of France and as such the doctrine of rebus sic stantibus was not applicable to this case.

With regard to revision of treaties, Article 19 of the Covenant of the League of Nations (1920) provided as follows:

"The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world."

That article, no doubt, permitted change in or the abrogations of a treaty which became inapplicable owing to a new situation having arisen, but the treaty could only be revised when a unanimous decision composed of representatives of 50 States was arrived at. Article 19 of the Covenant, therefore, confirmed the validity of the clause rebus sic stantibus but at the same time it rejected any claim to apply it unilaterally. That article only provided an opportunity of ventilating the view points of those who wanted a revision of the treaty. Lawrence says that it was of use as a means of testing opinion. The attempt to make changes in the treaty by a process of negotiation, inquiry and persuasion, was bound to fail as it completely fell short of the needs of a national organization, which could carry out the wishes of majority favouring the revision in the interests of peace, security and happiness of mankind.

During the last century opinion has been gaining ground that the doctrine rebus sic stantibus ought not to give a State the right immediately to revoke the treaty obligations upon the happening of a vital change of circumstances, but should entitle it to be released from them only with the consent of the other party or parties to the treaty. That was the procedure adopted by Turkey in 1936 when she sought to terminate the Treaty of Lausanne, 1923, concerning the Straits of the Dardanelles and Bosphorus, in view of fundamental changes in the political and military situation in Europe. A conference was called at the request of Turkey of the interested powers at Montreux in 1936, which terminated the carlier treaty by adopting a new one.

The Charter of the United Nations does not contain a provision analogous to Article 19 of the Covenant relating to the revision of treaties. The relevant provision in the Charter is Article 103 which reads thus:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

In this connection the provision of Article 14 of the Charter may also be noted, which provides that the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations. Considerations of the general welfare may necessitate a revision of treaty. In the same way if treaties give rise to situations which the Assembly deems likely to impair the general welfare or friendly relations among nations, it can make recommendations in respect of these situations. Such recommendations may also be made by the General Assembly under Article 10 wherein it has the power to discuss any questions or any matters within the scope of the present Charter, and any situation which is likely to

impair the general welfare or friendly relations among nations falls within the scope of the Charter.

It will appear from the above that .both Article 19 of the Covenant of the League of Nations and the Charter of the United Nations did not improve matters in this regard.

The Harvard Research in International Law emphasized the doctrine of rebus sic stantibus in Article 28 of the Draft Convention on the Law of Treaties as under:

- (a) A treaty entered into with reference to the existence of a state of facts the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or authority to have ceased when the state of facts has been essentially changed.
- (b) Pending agreement by parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.
- c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by a competent international tribunal or authority.

To the same effect are the observations of Brierly: ".....the doctrine of rebus sic stantibus is clearly a reasonable doctrine which it is right that international law should recognize. But as so defined it is a doctrine of limited scope which has little to do with the problem of obsolete or oppressive treaties, for which it is too often supposed to be the solution."

Article 56 (1) of the Vienna Convention on the Law of Treaties deals with treaties containing no provision regarding their termination and provides that "a treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: a) it is established that the parties intended to admit the possibility of denunciation; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. Article 56 (2) further provides that a party shall not give less than 12 months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 62 of the Vienna Convention on the Law of Treaties, 1969, provides:

- (1) A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
  - (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
  - (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
  - (2) A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

- (a) if the treaty establishes a boundary; or
- (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
- (3) If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treatty it may also invoke the change as a ground for suspending the opposition

Part V of the Vienna Convention on the Law of Treatics (1969) finally deals specifically with the invalidity, termination and suspension of the operation of treaties. It contains a variety of safeguards to protect the stability of the treaty structure, as the validity and continuance in force of a treaty is under the conditions provided for in the present articles. Article 42 carries force of treaty obligations to the rules of the Convention. The termination of a treaty, its denunciation or suspension, or the withdrawal of a party may provisions of that treaty, or of the Convention. Article 43 is a cautionary rule which makes clear that a State that sheds a treaty obligation does not escape any similar obligation to which it is subject under International Law independently of the treaty.

Doctrine of Jus Cogens.—Lastly, a treaty may be declared void if it conflicts with a peremptory norm (called jus cogens) of general international law. Article 53 of the Vienna Convention on the Law of Treaties, 1969 lays down that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law, which is a norm accepted and recognised by the international community of States as a whole as a norm subsequent norm of general international law having the same character. On an objection raised to the claim of invalidity of the treaty by any other party, conciliation, arbitration, judicial settlement, resort to regional agencies or of the U. N. Charter.

If the treaty is declared void under Art. 53 of the Vienna Convention on the Law of Treaties, the parties are required to climinate as far as possible the consequences of any act done in pursuance of any provision which conflicts with the peremptory norm of general international law and bring their mutual law. When a treaty becomes void and terminates on the emergence of a new peremptory norm of general international law as provided in Art. 64 of the Vienna Convention on the Law of Treaties, it (a) releases the parties from any obligation further to perform the treaty and (b) does not affect any right, the treaty prior to its termination (Art. 70); provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Robert E. Dalton, Cp. cit., p. 526. The Treaty on Treaties by Richard D. Kearney and

There has been divergence of opinion among publicists about the content and existence of jus cogens. Professor Schwarzenberger was of the view that "international law on the level of unorganized international society does not know of any jus cogens", while in sharp contrast Professor Verdross shared the view that "all rules of general international law created for a humanitarian purpose" and certain principles embodied in Art. 2 of the Charter had the character of jus cogens.

that if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. The termination of the treaty in the aforesaid circumstances releases the party from any obligation further to perform the treaty; but does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

As regards the decision concerning settlement of disputes on the interpretation and application of the articles contained in Part V of the Vienna Convention on the Law of Treaties, Article 66 of the Convention and the annex thereto provides for reference to the International Court of Justice, at the instance of any of the parties, of any dispute concerning the interpretation or application of the jus cogens articles, unless by common consent the parties agree to submit the dispute to arbitration; and for compulsory conciliation in relation to disputes concerning the interpretation or application of any of the other articles in Part V of the Convention. The reference of disputes concerning jus cogens to the International Court of Justice is a major achievement. Further, by codifying the doctines of jus cogens and rebus sic stantibus the Vienna Convention "provides a framework for dealing with change in an orderly fashson."

The doctrine of jus cogens was invoked by the German national judge (ad hoc) in his dissenting opinion in the S. S. Wimbledon<sup>1</sup> when, with reference to the Court's conclusion that in accordance with Art. 380 of the Treaty of Versailles, 1919, the Kiel Canal was to be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany, he stated that it could not be the intention of the victorious powers to bind Germany to commit offences against third States as by permitting the passage of the ship carrying contraband Germany would be violating the duties of a neutral.

Interpretation of Treaties.—There are three different theories of interpretation of treaties, viz. the subjective, the textual and the teleological. The subjective theory aims to interpret a treaty by endeavouring to ascertain the intention of the parties. The object of the interpretation of a treaty must be to give effect to the intention of the parties as fully as possible. The primary purpose of the interpretation of an international treaty is to ascertain its meaning by reference to the intentions of the parties to the treaty. One must look for the real and harmonious intention of the parties when they bound themselves: Island of Timor case.

I. P. C. I. J. Series A. No. 1 (1923)

<sup>2.</sup> Permanent Court of Arbitration, XV, p. 18.

The textual theory of interpretation of treaties places particular emphasis on the text of the treaty as incorporating the authentic expression of the intentions of the parties.

According to the teleological theory a treaty is to be interpreted in the light of its objects and purposes. This theory is, in effect, a combination of both the subjective and the textual theories.

The Vienna Conference on the Law of Treaties (1969) accepted the textual approach to the interpretation of treaties when it adopted the final set of draft articles prepared by the International Law Commission, and paragraph 1 of Article 31 provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. An indication is then given of what is meant by the context which is narrowly defined as comprising "in addition to the text, including its preamble and annexes", related agreements made by all the parties and instruments made by less than all the parties but accepted by all as related to the treaty. The subsidiary rules or the elements extrinsic to the text which may also be taken into account, together with the context, are confined to (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and (c) any relevant rules of international law applicable in the relations between the parties. [Art. 31 (2)]1

Article 32 permits supplementary means of interpretation to be resorted to, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of the general rule contained in Art. 31 or to determine the meaning when the interpretation according to the general rule (Art. 31) leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

The parties may agree informally upon the interpretation by annexing a protocol to the treaty or by making a supplementary treaty. Multilateral treaties often contain clauses providing for arbitral settlement of disputes arising out of contested interpretation of the provisions of a treaty.

The Institute of International Law at its Canada session (1956) adopted a resolution on treaty interpretation the text of which lays down that where there is occasion to interpret a treaty, States and international organizations and tribunals may be guided by the following principles:

Article 1: (1) The agreement of the parties having been reached on the text of the treaty, it is desirable to take the natural and ordinary meaning of the terms of this text as the basis of interpretation. The terms of the provisions of the treaty must be interpreted in the context as a whole, in accordance with good faith and in the light of the principles of International Law.

- (2) However, if it is established that the terms employed must be understood in another sense, the natural and ordinary meaning of those terms must be set aside.
- Also see The International and Comparative Law Quarterly, Vol. 19, 4th Series (1970)
   Vi enna Conference on the Law of Treaties by L. M. Sinclair, pp. 65-66.

- Article 2: (1) In the case of a dispute before an international tribunal, it will be the tribunal, taking account of Article 1, to determine whether and to what extent there is occasion to make use of other means of interpretation.
  - (2) Amongst other legitimate means, there are :
  - (a) recourse to travaux preparatioires (preparat ry work, i. e., the record of the negotiations preceding the conclusion of a treaty, the minutes of the plenary meetings and of the committees of the conference which adopted a convention, the successive drafts of a treaty, etc.);
    - b) the practice followed in the actual application of the treaty;
  - (c) the consideration of the aims of the treaty.

The various rules of interpretation of treaties which have commended themselves to various Courts and Tribunals may be summarised as under:

- All treaties must be interpreted in a manner which allows a reason and a meaning to every word in the text. (Lighthouses case).1
- If a treaty is drawn up in two languages which give somewhat contradictory meaning, the interpretation which accords with the intentions of the parties and harmonises both the versions must be adopted.
- 3. A narrow interpretation is to be placed on the provisions of a treaty which curtails the sovereign rights of a State.
- Where a document is ambiguous it should be construed in such manner which may make it less burdensome to the person responsible for the burden under the treaty.
- 5. If two interpretations are possible the one that involves the minimum of obligation to the parties should be accepted.
- 6. The purely grammatical interpretation of international treaties must stop at the point where it leads to contradictory or impossible consequence or which must be regarded as going beyond the intention of the parties. (Wimbledon case .2
- The treaty must be read as a whole, and its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.3
- 8. Where the object of an article in a treaty is one of equity, it must not be interpreted in too rigid a manner.
- 9. Treaties should be interpreted in broad and liberal spirit with a view to carrying out the apparent intention of the parties. It was observed in the case of Geofrey v. Riggs4 : "It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties ... As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended."

The same broad and liberal interpretation of treaties was reaffirmed in Tucker v. Alexandroff by the Supreme Court of the United States: "As

(1934) P. C. I J. A/B 62.

- 2. A. I, p. 36. 3. Clf. Miviory Opin on on Agricultural Labour (1922) by the Permanent Court of International Justice B.2-3. pp. 23 and 25. 4. 133 U.S. 258.
  - 183 U. S. 424.

treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence."

- of the history of the negotiations for ascertaining the intention of the parties and the actual terms of the treaty in which they have attempted to express this intention or reference to preparatory work is admissible in International Law when there is doubt as to the intentions of the parties.
- 11. An interpretation which makes a provision of the treaty meaningless or ineffective is not admissible.
- 12. A treaty should be interpreted in such a way as may advance the purpose for which it was made.
- 13. All treaties should be interpreted so as to exclude fraud, and so as to make their operation consistent with good faith.
- 14. Political a deconomic considerations whereunder the treaty was originally concluded may be considered while interpreting the treaty.

Interpretation of Treaties and Contracts.—There is a striking simi. Iarity in the principles governing the interpretation of treaties and contracts, words their ordinary and natural meaning, unless it leads to an obvious absurdity or an established custom or usage connotes a different sense. In by keeping in view the spirit of the treaty. It was observed by the Permanent Court of International Justice in the Mosul case<sup>2</sup> that in the first place it must be endeavoured to ascertain from the wording of the treaty what was the consider "whether—and if so, to what extent—factors other than the wording of the treat y must be taken into account for this purpose."

## CHAPTER XXIX

# ALLIANCES AND COMMERCIAL TREATIES

Reference may be made here to alliances—offensive or defensive—, treaties of guarantee and of protection, treaties of neutrality and commercial treaties.

Alliances.—Alliances inconsistent with the Covenant of the League of Nations were deemed abrogated as between members of the League under Art. 20 of the Covenant. The Charter does not preclude the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations. [Art. 52 (1)]. The various regional pacts entered into by different States have exhaus-

C/f. Oppenheim: International Law, Vol. 1, 8th Ed. p. 956.
 B. 12, p. 19.

tively been dealt with in a subsequent chapter on "Collective Security" and may be referred to there.

Casus Foederis.—Oppenheim obs rves that "casus foederis is the event upon the occurrence of which it becomes the duty of one of the allies to render the promised assistance to the other. Thus, in the case of a defensive alliance, the casus foederis occurs when war is declared or commenced against one of the allies."

Guarantee Treaties—Guarantee treaties are agreements between State—mutual or unilateral—whereby one of the parties undertakes to do a certain thing to secure a certain object to the other party. The guarantee may even be collective, as in the case of the neutralisation of Luxemburg, whereby the guaranters undertake to act in a body.

Commercial Treaties.—Commercial treaties relate to the commerce and navigation of the contracting States. They, however, contain clauses appertaining to consuls and other cognate things. Full sovereign States are fully competent to enter into commercial treaties.

Commercial treaties are outside the scope of the present book, excepting reference to coasting trade or cabotage and the most favoured nation clause. The former has been discussed elsewhere in an earlier chapter.

Most-favoured-nation clause .- Most of the commercial treaties contain a stipulation known as the most favoured-nation clause, in which, the words of Oppenheim, means that "all favours which either contracting party has granted in the past, or will grant in the future, to any third State must be granted to the other party."2 The United States, however, gave this clause till 1923 a somewhat restricted meaning by holding that these favours could accrue to such of the other contracting States only as "fulfilled the same conditions under which these favours had been allowed to the grantee ....... In this form it provides that all favours granted to third States shall accrue to the other party unconditionly, in case the favours have been allowed unconditionally to the grantee, but only under the same compensation, in case they have Leen granted conditionally."3 Oppenheim does not regard this conditional, qualified or reciprocal form to be justifiable, inasmuch as it is open to a number of objections. In the first place, it is difficult to say what amounts to reciprocal compensation of the same or equal value. In the second place, it will be "unfair to countries which have very few, or very low, duties and which are thus less favourably situated for negotiating than those which possess heavy or numerous duties." Upon the recommendations of the American Tariff Commission, 1919, and the Tariff Act of 1922, the United States has fallen in line with other countries in the matter of incorporating the mostfavoured-nation treatment clause in its unconditional form.

The system of tariff preferences between members of the Commonwealth countries is excluded from the operation of the most-favoured-nation clause on account of the peculiar nature of relationship between them, which regards such relationship as not international but domestic. Similar should be the case with the Europen Economic Community (Common Market), which has knocked down most of the tariff barriers between the member nations.

Oppenheim . International Law, Vol. I, p. 963.
 Ibid, 972.

<sup>3.</sup> Ibid., p. 972

### CHAPTER XXX

### II. INTERNATIONAL TOR IS AND DAMAGES

Types of International Torts. - International torts may arise either on account of its commission by a subject of International Law directly against another State, or on account of delinquencies committed against the nationals of another State. International responsibility exists in both the cases. Two conditions must, however, exist before a State can assert the respect due to International Law on account of injury to its national viz., the nationality of the claim and the exhaustion of local remedies.

Nationality of the Claim.- The right to resort to diplomatic action or international judicial proceedings in order to ensure in the person of its nationals respect for the rules of International Law is limited to intervention on behalf of its own nationals because it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection. (Panevezys-Saldutiskis Railway, 1939).1

Exhaustion of Local Remedies .- With regard to international responsibility for claims of the above kind "it is a very important rule of International Law that local remedies must have been exhausted without redress before a State may successfully espouse a claim of its national against another State. This is not a rule of procedure. It is not merely a matter of orderly conduct. It is a part of the substantive law as to international, i.e., State to State, responsibility. If adequate redress for the injury is available to the person who suffered it, if such person has only to reach out to avail himself of such redress, there is no basis for a claim to be espoused by the State of which such person is a national. Until the available means of local redress have been exhausted no international responsibility can arise. 2

Difficulty of Determination.—It is difficult to lay down the principles which could govern the nature and measure of damages caused to a State on account of international delinquencies. The Hague Codification Conference of 1930 thought it inexpedient to codify the rules governing the topic. Third Committee left the matter only by observing that the international responsibility of a State imported the duty to make reparation for the damage sustained in so far as it resulted from failure to comply with its international obligation.

In the Neer Claim, Neer, an American citizen, employed as the Superintendent of a mine in Mexico, was killed. The United States claimed damages on behalf of Neer's widow and daughter on the ground of an unwarrantable lack of diligence of the Mexican authorities in prosecuting the culprits. The commission recognised the difficulty of devising a general formula for etermining the boundary between an international delinquency

<sup>1.</sup> A/B 76, p. 16. 2. Judge Mauley O. Hudson in his Dissenting Opinion in the Panevezys-Saldutiskis Railway Case, P. C. I. J. Ser. A/B No. 76 (1939), p 47.
3. (1926) Opinions of Commissioners, 1927, p. 71.

and an unsatisfactory use of power included in national sovereignty and observed that it was in its opinion possible to hold that the propriety of governmental act should be put to the test of international standards, and that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.

Liability for Mob Action.—The question whether a State is or is not liable to pay damages for an injury suffered by an alien as a result of mob violence is not free from difficulty. If the mob violence is considered as falling in the category of force majeure, no responsibility attaches to the State. It, on the other hand, there is the failure of the properly constituted authorities to exercise due diligence for protection of alien property, the State is certainly responsible.

It was laid down, as one of the principles, by the Harvard Research that a State is responsible if an injury to an alien results from an act of an individual or from mob violence, if the State has failed to exercise due diligence to prevent such injury. The principles involved in State responsibility arising out of the action of a group of individuals or a mob inflicting injury upon an alien, are in theory not different from those governing State responsibility arising out of the acts of single individuals. The change in the factual situation when larger groups are involved may, however, impose a duty to exercise a greater degree of diligencee upon the State to prevent an injury.

In United States (Rosa Gelbtrunk Claim) v. Salvador! the arbitrators held that an alien carrying on trade within the territory and under the protection of the sovereignty of a nation other than his own is to be considered as having cast in his lot with the subjects or citizens of the State in which he resides and carries on his business. While enjoying the protection of that State he becomes liable to the political vicissitudes of the country in which he thus has a commercial domicile.

The general principle of law governing the responsibility of State in respect of an alien may thus be summed up in the words of Richard Olny, American Secretary of State: "The general position is that the responsibility of an established government for acts committed by rioters or insurgents depends upon the failure of the constituted authorities to exercise due diligence for protection of alien property when in a position to protect it and the imminence of danger is known."

Liability for damage caused by objects launched into Outer Space.

The question of drafting a convention on Liability for Damage caused by Objects launched into Outer Space has been under consideration for a number of years by the Legal Sub-Committee of the U. N. Committee on the Peaceful Uses of Outer Space. The more controversial aspects of the Draft Liability Convention have been: (1) Whether there should be a ceiling on the quantum of damage; (2) the apportionment of liability in cases where more than one State contributes to the launching of a space object; (3) the settlement of disputes arising out of claims for damages; and (4) the law applicable to disputes regarding claims for damages.

The compulsory protocol on settlement of disputes envisages a three-stage

<sup>1. (1923)</sup> Mixed Claims Commission, p. 17.

procedure: In the first place, if negotiations through diplomatic channels do not lead to a settlement of the claim within six months of its presentation then an inquiry commission may be established on the basis of parity between the claimant and the respondent which shall make recommendations with regard to the settlement of claims within six months of its establishment. If the inquiry commission is not established or if it is unable to arrive at any recommendation within the specified period, then a tripartite Claims Commission shall be established upon the request of either party, the Chairman being jointly nominated by the claimant and the respondent. Failing agreement between the claimant and the respondent in this regard, the Chairman shall be chosen by the U. N. Secretary-General. A majority decision of the Claims Commission shall be binding on the parties.

Measure of Damages .- It was observed by Umpire Parker in the Lusitania1 that it is a general rule of both the civil and the common law that every invasion of private right imports an injury and that for every such injury the law gives remedy. Speaking general, that remedy must be commensurate with the injury received. In making an estimate the various factors that required consideration were the age, sex, health, condition and station in life of the deceased and the uses made of such earnings by him; the probable duration of the life of the deceased but for the fatal injury; the age, sex, health condition and station of life of each of the claimants, etc. No exemplary, punitive, or vindictive damages can be assessed.

In the Case concerning the Chorzow Factory (Jurisdiction) it was observed by the Court that "reparation is the indipensable complement of a failure to apply a convention, and there is no necessity for this to be stated in he convention itself."

In the later case, Chorzow Factory (Indemnity the Court observed that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed, if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear ; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it-such are the principles which should serve to amount of compensation due for an act contrary to International Law.

In the Reparation of Injuries Suffered in the Service of United Nations3 the International Court of Justice upheld the capacity of the U. N as an Organization to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused to the United Nations and to the victim or to persons entitled through him. It observed that the claim being based on the breach of an international obligation on the part of the member held responsible by the Organization, the member could not contend that obligation was governed by Municipal Law, and the Organization was justified in giving its claim the character of international claim.

 <sup>(1927)</sup> P. C. I. J. Series A. Ko. 9.
 (1928) P. C. I. J. Series A. No. 17.
 I. C. J. Reports, 1949, p. 174.

# INTERNATIONAL INSTITUTIONS CHAPTER XXXI

### I. THE LEAGUE OF NATIONS

Its origin.—The League was established under the Treaty of Versailles concluded between the Allied and Associated Powers and Germany on June 28, 1919. A proposal to establish an institution for the purpose of preserving the peace was made to the Inter-Allied Conference at Paris on January 25, 1919, and in accordance with a resolution adopted at the Conference, a commission, with President Wilson as the head, was constituted to prepare a draft constitution, for the organization. At the Peace Conference a number of drafts were considered and the Covenant was adopted by the Conference on April 28, 1919. Accordingly the League was established in 1920 under a Covenant of 26 Articles, forming Part I of the Peace Treaty of Versailles and other peace treaties. The formation of the League was Point 14 of President Wilson's Fourteen Points, but the U. S. Congress refused to ratify the Treaty of Versailles, which kept U. S. A. outside the League.

Members.—The members of the League consisted of the Allies signatories to the Peace Treaties who subsequently ratified their treaties, e. g., the British Empire, Italy, Japan, China, etc., the neutral States which originally accepted to the Covenant of the League, i. e., Switzerland, Norway, Spain, Persia, etc., and the States admitted to membership of the League in accordance with the provisions of Article 1 of the Covenant.

Functions and Objects.—The main functions of the League were two, (i) viz., the maintenance of international peace and security and (ii) the promotion of international co-operation, as is apparent from the following Preamble of the Covenant:

"The High Contracting Parties in order to promote international cooperation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open just and honourable relations between nations, by the firm establishment of the understandings of International Law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another, agree to this Covenant of the League of Nations."

Constitution.—The working machinery of the League consisted of the Assembly, the Council and the Secretariat.

Every member of the League of Nations was a member of the Assembly. Article 3 of the Covenant provided that each member of the League could send three representatives to the Assembly but the members had only one vote each. The session of the Assembly was held in public, and its decision had to be unanimous unless otherwise provided by the Covenant. The of the League or affecting the peace of the world (Art. 3); but there were matters which were exclusively reserved for consideration of the Council and they could not be taken up by the Assembly at its meetings. Under Article 5

of the Covenant decisions at any meeting of the Assembly required the agreement of all members of the League represented at the meeting, except in matters of procedure where decision could be taken by a majority of the members of the League represented at the meeting.

The Council.—It was the executive of the League. Originally the League Council was to be confined to the Five Principal Allied and Associated Powers, who were to have permanent seats and representatives of four other States elected by the Assembly, but the U. S. Congress refused to ratify the Treaty of Versailles in 1920 and to join the League. With the approval of the majority of the Assembly, the Council could name additional members of the League, whose representatives were to be members of the Council. There was also ad hose representation of a member of the League when its interests were under consideration, provided that it did not have a regular representative on the Council. In 1926 the composition of the Council was altered by the admission of Germany to the League and allotment of a permanent seat on the Council, and eventually the Council also consisted of 11 non-permanent members, three to be elected each year for three years.

The Council also dealt at its meetings with any matter within the sphere of action of the League or affecting the peace of the world, but besides it had some matters within its exclusive cognizance, such as the confirmation of staff; appointments made by the Secretary-General; the formulation of plans for the reduction of armaments; expulsion of a member for violating the terms of the Covenant; the treatment and supervision of the mandated territories, etc. Its decision usually had to be unanimous except in matters of procedure or where otherwise provided. The Council met normally three times a year.

The Leagne Council was an authority of an eminently political character. The Permanent Court of International Justice in its Advisory Opinion in the Mosul case (1925) likened it to a diplomatic conference.

The Secretariat.—At the head of the Secretariat there was the Secretary-General, who, with the approval of the Council, appointed the secretaries and the staff. The Secretariat was a permanent body established at Geneva. The expenses of the Secretariat were met by the League budget borne by the members of the League in the proportion decided by the Assembly. The Secretariat prepared agenda for the Council and the Assembly, kept the minutes of the meetings and carried out administrative work. The Secretariat was divided into various sections and each section dealt with the special task allotted to it.

The Covenant of the League also provided for the establishment of a Permanent Commission to advise the Council on military, naval and air questions generally and also on execution of plans for reduction of armaments, the Permanent Mandates Commission, the Permanent Court of International Justice and the International Labour Organization.

The Maintenance of World Peace—The avoidance of war by the peaceful settlement of disputes was the main objective of the League, and with a view to achieving that objective various provisions were inserted in the Covenant. Ar-icle 8 of the Covenant recognized that the maintenance of peace required the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations, and for this purpose required the Council to formulate plans for

such reduction for the consideration and action of the several Governments. Under Article 10 the members of the League undertook to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. This Article constituted a general territorial guarantee as against external aggression of the territorial arrangements of the peace settlement of the Treaty of Versailles. Articles 11 to 17 of the Covenant contained the scheme for achieving the peaceful settlement of dispute. Article 12 of the Covenant enjoined upon the members not to employ force for the settlement of a dispute but to submit the matter either to arbitration or judicial settlement, or to inquiry by the Council. If the League or the arbitrators failed to reach a unanimous decision within six months after the submission of the dispute, the disputing nations could not resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council. Article 14 enabled the Assembly or the Council to refer any dispute or question to the Permanent Court of International Justice for an advisory opinion. Article 16 provided that if any member of the League resorted to war in violation of its Covenant relating to arbitration, judicial settlement, or inquiry by the Council, it should ipso facto be decined to have committed an act of war against all other members of the League, who should thereupon immediately sever all trade or financial relations and prohibit all intercourse between their nationals and the nationals of the Covenant-breaking State. Under Article 17 provision was also made for the settlement of a dispute between a member of the League and a non-member in which case an invitation was to issue to the non-member. State to accept the obligations of membership in the League for the purposes of such dispute, but if it refused to accept the same by resorting to war against a member of the League the provisions of Article 16 of the Covenant were made applicable as against the State taking such action.

Article 15 of the Covenant authorised the League Council to make recommendations on reference of a dispute likely to lead to a rupture which was not submitted to arbitration or judicial settlement in accordance with Aricle 13. It is true that even a unanimous report of the Council was not binding upon the parties. It was, however, emphasized by the Permanent Court of International Justice in the Mosul case (1925) that Article 15 set out the minimum obligations which were imposed upon States and the minimum corresponding powers of the Council. There was nothing to prevent the parties from accepting obligations and from conferring on the Council powers wider than those resulting from the strict terms of Article 15, and in particular from substituting, by an agreement entered into in advance, for the Council's power to make a mere recommendation, the power to give a decision which, by virtue of their previous consent, compulsorily settled the dispute.

Intimately connected with Article 10 of the Covenant guaranteeing the territorial integrity of a State against aggression was Article 19, which reads as follows:

Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world."

Although the scope of this Article was very comprehensive, it failed to achieve the desired object. In the first place, t ere was no legal obligation upon the members to follow the advice tendered by the Assembly. And, in

the second place, as Lawrence observes, the Article was of use only as a means of testing opinion. The revision of a treaty could not be done unilaterally and required the unanimous verdict of the Assembly.

Article 20 of the Covenant abrogated all obligations or understandings between members inter se which were inconsistent with the terms thereof.

Article 21 provided that the Covenant did not affect the validity of international engagements such as treaties of arbitration or original understandings like the Monroe Doctrine, for securing the maintenance of peace.

Article 22 referred to the system of Mandates, which has already been discussed earlier in a separate chapter.

Promotion of International Co-operation.—With regard to the promotion of international co-operation Article 23 of the Covenant authorized the members to endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extended and to undertake to secure just treatment of the native inhabitants of territories under their control. For securing humane conditions of labour an International Labour Office was established at Geneva, the governing body of which consisted of delegates representing employers and workers.

The members of the League further agreed to entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, the traffic in opium and other dangerous drugs and supervision of the trade in arms and ammunition. The League also maintained international co-operation in connection with slavery, forced labour and international hygiene. Permanent Advisory Committee on Opium and other dangerous drugs, another on social questions and the Permanent Central Opium Board were also established to achieve the above objects.

Withdrawal.—A member of the League was allowed to withdraw on two years' notice. He could also be expelled for violating the Covenant by the decision of the Council agreed to by all the representatives of the other members. Similarly, a member could cease his membership by refusing to agree to any amendment of the Covenant, which had been ratified by the Council and a majority of the members of the Assembly.

Position of the League.—The League of Nations was not a super-State and possessed no sovereign legislative power. For the enforcement of its decisions it depended entirely on the goodwi'l of the governments of the States who were its members. The whole structure of the League had at its root the consent of the members. The provisions contained in the Covenant of the League amply protected the freedom of the members, as they required unanimity of decision of the Council or the Assembly in most important matters. They also permitted the members to withdraw from the League on the happening of certain contingencies.

The League was an association of States whereby they mutually limited their freedom of action in certain matters with a view to promoting international co-operation and achieving international peace and security. It was certainly neither a federation nor a confederation, inasmuch as each member reserved to itself complete freedom to regulate its external affairs and the League could not exercise control over the member-States beyond what they had willingly and by consent surrendered to the League. But here again the

decisions of the League were merely recommendatory in nature and required in most of the cases unanimity of decisions of the member-States. It could not also be termed a State. It lacked the necessary characteristics of a State inasmuch as, although a permanently organised society, it did not occupy a certain territory over which it had the supreme authority.

Dr. Oppenheim in summing up the position of the League observes that the League appeared to be a league absolutely sui generis, a union of a kind which had never before been in existence; and its constitutional organs as well as its functions were likewise of an unprecedented kind. He concludes that the Covenant of the League was an attempt to organize the hitherto unorganized Family of Nations by a written constitution and the League was nothing else than the organized Family of Nations.

Causes for the failure of the League.—The Great War ended in 1919 by a Treaty of Peace with Germany known as the Treaty of Versailles, in the forefront of which was the Covenant of the League of Nations. The Covenant was signed or afterwards acceded to by every power in the world except China, Russia and defeated Germany and her allies. President Wilson had signed the Versailles Treaty, including the Covenant of the League of Nations, thereby making the U. S. A. a founder member of the League. The United States Senate, however, decided to withhold the ratification of this accession and kept the U. S. A. outside the League, apparently because the Congress was not prepared to consent or guarantee the territorial settlements in Europe.

There was a wide cleavage between the conquerors and the vanquished of the World War of 1914-18 and the onerous terms imposed on the defeated Germany reduced the chance of the successful working of any world organization. The establishment of the League of Nations was, therefore, only a device to ward off the troubles that lay ahead. From its inception the propounders of the League were careful not to insert any lause which might interfere with their individual sovereignty. The inevitable consequence was that in its very early history the League was crippled by the withdrawal of the United States of America and the non-admittance of Russia and the adversaries of the Allies of the First World War during the critical formative years. "What brought the international order of 1919 to its downfall was not the refusal of the United States to join the League of Nations, but the policies pursued by the great powers, the United States included, inside and outside the League of Nations," 1

The League was part of the Treaty of Versailles and bound up with its fulfilment. All the powerful nations that joined the League in the early days did so in the sense that they wanted something to buttress existing treaties and existing territorial settlements. Every member of the League was absolutely pledged to guarantee the territorial integrity and political independence of every other member on the basis of the map drawn up at Paris by the victoricus powers.

The League of Nations Disarmament Conference failed to achieve its object. Germany by repudiating the military clauses of the Treaty of Versailles began to arm herself and increase the military strength. A pious resolution by the League declaring that Germany had committed a breach of the Treaty of Versailles was of no avail.

When Germany joined the League in 1925 the prospects of the successful working of the League had improved, but after the establishment of Hitler's 1. See Essay by Hons J. Morgenthau, Law and Politics in the World Community, edited by George A. Lipsky, p, 143 at p. 149.

dictatorship in 1933 Germany left the League again. In 1931 the League failed to prevent Japanese aggression against China in Manchuria. The League, no doubt, condemned the violation of the obligations of the Covenant on the part of Japan, but this led to the withdrawal of Japan from the League and the latter kept mum. In the year 1934 Russia joined the League and the League gathered some momentum, but this accession of strength was only ephemeral. In 1935 Italy invaded Abyssinia and in September of that year Abyssinia appealed to the League under Article 10 of the Covenant. This article, as discussed above, obliged the members to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. When the League resorted to economic and financial sanctions against Italy it found itself hampered by the fact that the various constituent members did not fulfil their obligations; the action of the League to enforce peace upon the aggressor failed. Italy withdrew from the League and could not be prevented from conquering Abyssinia as the League confined its sanctions to a restriction of trade and could not proceed with military sanctions. Rhineland was re-occupied by Germany in 1936. The annexation by Germany of Austria in 1938, and, despite the Munich appeasement, Czechoslovakia in 1939 could not be opposed by the League. stood by helpless while Russia invaded Finland in 1939, "and the League manifested its impotent displeasure and frustration by expelling the Soviet The League Government. That seems to have been the last important activity of the League.1" From the Polish seizure of Vilna to the German invasion of Czechoslovakia, observes Smith, there was an almost unbroken crescendo of successful lawlessness. This dismal failure of the League in securing peace to the innumerable people all over the world resulted in the reversion of nations to the old policy of pacts, alliances and blocs with a view to maintaining the balance of power instead of placing reliance on the League. Faith in the possibility of a world ruled by law dwindled to the vanishing point.

Mr. Anthony Eden while analysing the causes of the failure of the League asserted that it failed for two reasons. First, the idea of one nation, one vote, led to Liberia being as important as the Soviet Union, or Costa Rica as the United Kingdom. That was not a sound basis on which to found an international organisation because it was not a basis of truth, Secondly. the League, though conceived as universal, was in fact never universal.<sup>2</sup>

The other causes which led to the failure of the League may also be noticed. All decisions of importance in the League required unanimity. There was no clear demarcation of functions between the Assembly and the Council. The Council had only recommendatory power and could not enforce its decisions by military sanctions. The League was not a super-sovereign State and could not take collective measures, the necessary concomitant for the successful working of any world organisation. The League was an association of States and did not lay emphasis on the needs of the peoples of the world. There was unwillingness on the part of the States in general to assume international obligations in the common interests. There were successive deadlocks over disamnament. The injustice meted out to the conquered States at the treaty of versailles was still fresh in their minds as the provisions of the treaty were very oppressive in their nature and the League did not provide for the revision of treaties except by the unanimous decision of the member states. Oppenheim states that a member could also be expelled or cease its membership by refusing to assent to the amendments ratified by the Council

2. J. E. D. Hall: Labour's First Year, p. 25

<sup>1.</sup> Hartmann: Readings in International Relations, p. 177.

and a majority of the members of the Assembly and the result was that the recalcitrant member could not be forced to abide by the decisions of the League. Then judicial settlement by the Permanent Court of International Justice was not made compulsory and the member States were allowed to violate International Law or imperil peace and security of the world with impunity. There was no provision to deal effectively with the aggression committed by any big power which could protect the victim. It was necessary to provide for a separate Council of Conciliation which could act impartially, without any basis for the Great Powers, in the settlement of disputes. Further, the League had no power to intervene in case of violation by a State of the rules of warfare. In order to enforce strict observance of the rules of warfare on the part of both belligerents war crimes should have been made punishable.

Finally, it has been said that the League of Nations failed because it had no teeth. This is true as far as it goes. The main reason for the failure of the League was that its members did not implement the principles it stood for. They declined to honour their commitments.

#### CHAPTER XXXII

### II. THE UNITED NATIONS

Its Genesis.—We have seen earlier that by the year 1938 the League of Nations had almost become a defunct body. The obstacles which it had to face on account of the intransigence of Japan, Italy and Germany proved insurmountable due to the complacent attitude of big powers in not entangling themselves in matters which did not affect them directly. These big powers reverted to the old policy of pacts, alliances and blocs with a view to maintaining the balance of power. The Second World War started in the year 1939. As the horrors and ruthless destruction brought about by the war increased, the idea of establishing a general organization of States for the preservation of peace and promoting international co-operation gained importance. There was some doubt as to whether the League of Nations should be revived, but it was soon set at rest by the general opinion that there should be a new world organization which could inspire hope and confidence in the teeming millions of everlasting peace. The following may be summed up as the steps that led to the formation of the United Nations.

- 1. London Declaration.—The London Declaration was signed on June 12, 1941, at St. James's Palace by the representatives of Britain, Canada, Australia, New Zealand and South Africa and of the several exiled Governments. The document declared against separate peace and stated that the only true basis of enduring peace was the willing co-operation of free peoples in a world in which, relieved of the menace of aggression, all might enjoy economic and social security and that it was their intention to work together, and with other free peoples, both in war and peace, to that end.
- 2. Atlantic Charter.—In August 1941 Psesident Roosevelt and Mr. Churchill met in conference on board the Prince of Wales in the Atlantic Ocean. They signed a declaration known as the Atlantic Charter on August 14, 1941, which condemned the use of force and territorial aggrandisement

See ante, Chap. XXXI, p. 355.

and envisaged security from aggression and freedom to choose the form of Government to the peoples. It was declared that after the final destruction of Nazi tyranny, they hoped to see established a peace which would afford to all nations the means of dwelling in safety within their own boundaries, and which would afford assurance that all the men in all the lands might live out their lives in freedom from fear and want and that they believed that all of the nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force.

- 3. United Nations Declaration.—Then follows the United Nations Declaration signed by the representatives of 26 States on January 1. 1942, at Washington. This Declaration subscribed to the principles embodied in the Atlantic Charter, each nation pledging itself to employ its full resources against the enemy. Each Government pledged itself to co-operate with the Governments signatory thereto and not to make a separate armistice or peace with the enemies.
- 4. Moscow and Teheran Conferences.—In the Moscow Declaration of November 1, 1943, the Foreign Ministers of Britain, the United States, Russia and China recognised the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security.

Two months later, Roosevelt, Stalin and Churchill declared at Teheran that they were sure that their concord would win an enduring peace.

5. Dumbarton Oaks and Yalta Conferences.—With a view to translating the principles of the Atlantic Charter and the Moscow and Teheran Declarations into action, conversations were held at a mansion known as Dumbarton Oaks in Washington in September 1944, between the representatives of the Governments of Great Britain, the United States, Russia and China. The conference concluded on October 7, 1944, when the proposal for the structure of the world organization was published. It was the first blueprint of the United Nations Organization.

According to the Dumbarton Oaks proposals, the key body in the United Nations for preserving world peace was to be the Security Council on which the "Big Five", viz., China, France, the U. S. S. R., the U. K., and the United States, were to be pemanently represented. The voting procedure in the Council was, however, not specified in the proposals. This was discussed at Yalta (Crimea) at a conference between Roosevelt, Churchill and Stalin. On February 11, 1945, the conference announced that this point had been settled. It was further agreed that a conference of United Nations be called to meet at San Francisco in the United States on April 25, 1945, to prepare the charter of such an organization, along the lines proposed in the informal conversations of Dumbarton Oaks.

6. The San Francisco Conference.—Finally the delegates of 50 nations met at San Francisco between April 25 and June 26, 1945. Working on the Dumbarton Oaks proposals, the Yalta agreements and the amendments thereto as suggested by various Governments, the Conference hammered out the Charter of the United Nations and the Statute of the International Court of Justice. The Charter was passed unanimously and was signed by all the

representatives on June 26, 1945. The Charter of the United Nations came into force on October 24, 1945, when the five original members, viz., China, France, the U. S. S. R., the United Kingdom and the United States and a majority of the other signatories filed their instruments of ratification. October 24 has since been celebrated as United Nations Day.

The Charter of the United Nations is a multilateral treaty. While it is the basic constitutional document of the Organisation, it also establishes or restates the rights and duties of the signatory States.1

Its objects.—The objects of the United Nations are set forth in its Charter. Shorn of all unnecessary details, the preamble to the Charter reads:

"We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of International Law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practise tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure..... that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims,

"Accordingly, our respective Governments.......have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations."

The objects are further elaborated in Article 1 of the Charter which says that the purposes of the United Nations are to maintain international peace and security, to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, to achieve international co-operation in solving international problems of an economic, social, or cultural, humanitarian character and to be a centre for harmonising the actions of nations in the attainment of these common ends.

The Principles of the United Nations.—Article 2 of the Charter lays down the principles which are to be followed by the Organization and its members in pursuit of the purposes stated above. They are as follows:

1. The Organization is based on the principle of the sovereign equality of all its members. This clause is subject to certain limitations. The permanent members of the Security Council possess greater rights than other members of the United Nations. The consent of the former is required for the validity of important decisions both of the Council and the Assembly. Their consent is necessary for amendment of the Charter, for admission of new members of the United Nations, for decisions and recommendations in regard to the sattlement of disputes and their enforcement, etc. Then, enforcement measures cannot be taken against permanent members

save by their consent. "The structure of the Security Council shows clearly", observes Hans J. Morgenthau in a brilliant essay, "that those nations which have permanent membership in that organ, because of their actual or alleged superiority in power, were intended to function, with the assistance of two non-permanent members of the Security Council, as a kind of limited world government, to which not only the other member nations of the organization, but in a certain measure all nations would have been subject. This function envisaged implicitly in the Charter has never been realized; for the lack of unity among the great powers has made it impossible for the Security Council to function as intended in the Charter." Subject to such greater powers of the permanent members their equality as sovereign States remains undiminished.

- 2. All members, in order to ensure to all of them rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
- 3. All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
- 4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.
- 5. All members shall give the United Nations every assistance in any action it takes in accordance with the Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.
- 6. The Organization shall ensure that non-member States of the United Nations act in accordance with the principles of the Charter for the maintenance of international peace and security.
- 7. Nothing contained in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII. The question whether the matter is essentially within the domestic jurisdiction of the State often presents some difficulty and, in case of dispute, must be determined by some competent organ of the United Nations. In the case of the Indo-South African dispute with regard to the discriminatory treatment meted out to people of Indian origin in South Africa, or the policy of apartheid pursued by the Government of the Union of South Africa, South Africa claimed that the Assembly was debarred from taking cognizance of India's complaint as the matter was one which fell within their domestic jurisdiction under para. 7 of Art. 2. This contention was, however, negatived on the ground that the various anti-Indian legislations passed by the Union of South Africa were not in conformity with international obligations under the agreement concluded between the two States and the relevant provisions of the Charter. The racially discriminatory policy pursued by the Union Government is in flagrant violation of fundamental human rights, and has created conditions which are a threat to international peace.

The Assembly's recommendation in December 1946 to debar Spain from the membership of any international organization connected with the United Nations, and the discussion of the Γunisian, Moroccan, Algerian and Cyprus

1. Law and Politics in the World Community-Edited by George A Lipsky, p. 147.

questions, evoked strong protests from the governments concerned. Again, when in 1950 Korea was invaded from the north, the United Nations decided that it was a matter of international concern, while the Soviet Union said it was a civil war.

The U. S. S. R. challenged the Security Council's right to discuss Britain's complaint with regard to the Anglo-Iranian oil dispute on the ground that it would constitute intervention in the internal affairs of Persia and would be a crude violation of the sovereignty of Persia, but the Security Council heard the complaint against Persia even in face of the objections from the Soviet Union.

A similar controversy arose in connection with the Soviet intervention in Hungarian affairs in October-November, 1956, and in Czechoslovakia in August, 1968.

The rider added to the main provision of Art. 2 (7) permits the Security Council to take cognizance of the dispute which threatens international peace and security and requires enforcement measures for its resolution, although falling within the domestic jurisdiction of the State. Further, decision as such will not constitute intervention and as such is not prohibited by this article.

Besides the general limitation on the powers of the Organization contained in para. 7 of Art. 2 of the Charter, there is another limitation flowing from the normal principle of the law of treaties, viz., pacta tertiis nec nocent nec prosunt' i. e., the Charter as a multilateral treaty is binding only on the parties thereto—it cannot bind non-members. But the rigidity of this principle is modified by the provision of Art. 2 (6) mentioned above, viz., that the Organization shall ensure that non-members act in accordance with the principles of the Charter for the maintenance of international peace and of 1966, while deciding upon economic sanctions against Rhodesia, specifically with it.

Erosion of Art. 2 (4) of the Charter.—Although Article 2 (4) of the Charter provides that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, internecine wrangles in the deliberations of the Security Council and want of the assent of its nine members, including the affirmative vote of the Big Five, has prevented the Security Council from taking any positive enforcement action. As a result of the failure of the U. N. machinery, the fighting between China and India, Pakistan and India, North and South Korea and in Vietnam continued unabated, both sides operation of Art. 51, as observed by Thomas M. Franck<sup>2</sup> is "effectively and dangerously unlimited. The temptation remains what it was before Art. 2 (4) was conceived: to attack first and lie about it afterwards."

Article 51 of the United Nations Charter is, in terms, an exception to Art. 2 (4). It permits the exercise of the inherent right of individual or collective selfd-efence in case of an armed attack against a member of the United Nations. The United State's intervention in the Lebanon crisis of 1958 was justified as collective self-defence under Art. 51 of the Charter with a view to preserve Lebanon's integrity and independence by the Chamoun Government.

Lauterpacht . International Law and Human Rights (1950), p. 156.
 American Journal of International Law, Vol. 64, 1970 p. 809.

The Soviet invasion of Hungary in 1956 was characterised by the U. S. S. R. as aid to a friendly Government under attack within the meaning of Art. 51 of the Charter. "Unfortunately", as observed by Thomas M. Franck, "there is nothing in the U. N. Charter or in the machinery of the international system which limits the nation's right to determine for itself when an act of aggression has occurred, or whether the regime calling for help is, in fact, the legitimate government."

Further, modern warfare has assumed different dimensions not anticipated earlier. A State could not await its own extinction by an actual nuclear strike against its territory before taking counter-measures as envisaged in Art. 51. Further, the regional arrangements or agencies contemplated under Arts. 52 and 53 have taken the law into their own hands whenever it suited them. Action taken by the U.S. S. R. under the Warsaw Pact in Hungary and Czechoslovakia with a view to achieving 'peaceful settlement' had not strictly been in consonance with the spirit of those Articles. The Warsaw Pact and the NATO have even established 'unified commands'. In recent years the Brezhnev doctrine has envisaged a Socialist Commonwealth: interstate disputes are to be resolved within that grouping of socialist family, and not by or in the United Nations.

Membership.—Admission to the United Nations is regulated by the provisions of its Charter. The members of the United Nations consist of the original members as provided in Art. 3 and the members admitted in accordance with Article 4 of the Charter. Under Art. 3 of the Charter the original members of the United Nations consist of all the 51 States which participated in the San Francisco Conference of 1945 or which had previously signed the declaration of the United Nations of January 1, 1942, and ratified the Charter. Under Art. 4 of the Charter the members are admitted to the United Nations by a decision reached by a two-thirds majority of the General Assembly on the recommendation of the Security Council, for which recommendation a majority of nine members of the Council, including the concurring votes of its permanent members, is necessary.

Article 4 of the Charter lays down that membership in the United Nations is open to all other peace-loving States, which accept the obligations contained in the Charter and, in the judgment of the Organization, are able and willing to carry out these obligations. The Charter does not lay down any condition of membership other than that the new members must be peace-loving States. The term "peace-loving states" has nowhere been defined in the Charter. Article 4 of the Charter further envisages that such States, before they are admitted to the United Nations Organisation, are, in its judgment, alle and willing to carry out the obligations contained in the Charter. It is thus clear that no State has under the provisions of the Charter a right to be admitted as a member. The whole thing is left to the members of the General Assembly and primarily to the Security Council to exercise their judgment in good faith to arrive at the conclusion whether the State seeking admission is peace-loving and whether it is able and willing to carry out the obligations of the Charter.

A careful reading of Art. 4 of the Charter will show that it contemplates the fulfilment of the following five conditions for admission of a State to the United Nations, namely, that the applicant must (i) be a State; (ii) be peaceloving; (iii) accept the obligations of the Charter; (iv) in the judgment of the Organization, be able to carry out those obligations; and (v) again, in

American Journal of International Law, Vol. 61, 1970. p. 809.

the judgment of the Organization, be willing to carry out those obligations. These conditions, which are the pre-requisites for admission of a State to the United Nations, were emphasised by the International Court of Justice in its Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations.\(^1\) The Court observed that a member must, while exercising its right to vote, have regard only to the qualifications of a candidate for admission as set out in Art. 4 of the Charter, and not take into account extraneous political considerations.

In the Competence of the General Assembly for the Admission of a State to the United Nations,<sup>2</sup> the International Court of Justice opined that the admission of a State to membership in the U. N., pursuant to Paragraph 2, Article 4 of the Charter, cannot be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission, by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent member upon a resolution so to recommend.

It might be mentioned here that in 1946 one of the first things the first General Assembly of the United Nations did was to denounce the Franco Government of Spain, and it recommended that the Franco Government be debarred from membership in international agencies established by the United Nations and that all members of the United Nations should immediately recall from Madrid their ambassadors and ministers plenipotentiary. Spain was, however, admitted in November 1952 to the United Nations Économic, Social and Cultural Organization on account of the East-West tension and she is now a member of the United Nations.

As stated above new admissions must be made by the concurring votes of the permanent members of the Security Council. The U.S.S.R. at the outset vetoed all individual applications for admission of new members sponsored by the West and counter-proposed bloc entries of nominees of both the East and the West. The cold war had thus kept out of the United Nations several States on account of the veto exercised by either of the two blocs. In spite of there being a committee on the admission of new members set up by the Security Council in May 1946, only ten States were admitted as members in the United Nations during the period 1946 to 1950 and 21 States having long applied for membership were not admitted because of the discriminatory use of Art. 4 by the Big Five in the Security Council. By the end of 1959, thirty-two new States had been admitted to membership in the United Nations, bringing the total membership to 82. Thirteen African States and Cyprus were admitted to its membership at the 15th session of the Assembly in September 1960. Nigeria, Sierra Leone, Kenya, Zanzibar, Islands, Singapore, Gambia, the Republic of Southern Yemen (formery Aden), Fiji, Bhutan (formerly a protectorate of India), Bahrain and Qatar (formerly British Middle East Protectorates) and Oman were also subsequently admitted to membership of the nited Nations. The United Nations has changed in recent years in the sense that the number of its members has increased from 50 to 132 in December 1972, with substantial representation of Asian and African States in the world organization. The Afro-Asians constitute more than half of its membership.

China's admission in the U. N.—Ever since the mainland of China was overrun by the Communists, they had aspired for a seat in the United Nations, At the end of the second world war, the five major allied powers—

 <sup>(1948)</sup> I. C. J. Reports, 61.
 I. C. J. Reports 1950, pp. 4-14

Britain, France, United States, U. S. S. R. and China—had been rewarded with a special status, in the form of a permanent seat in the Security Council. The membership of the Security Council bestowed certain special privileges and a bigger voice in the affairs of the world. Although international power patterns took many new shapes over the postwar years, the permanent members of the Security Council remained the same. A case to the point is China. Although the Communist government of China extended its authority all over the mainland, and the Chiang Kai-shek junta was forced out of China to their last outpost in Taiwan island, the Taiwan government retained its seat as representative of the entire Chinese people, mostly by American patronage. This was of course an anachronism and had to be removed. India, Soviet Union and other socialist countries and several others occasionally made efforts to seat the leking government in place of Taiwan, but the United States in league with its allies every time blocked these moves.

In October 1971, the Nixon administration of the United States, as part of its endeavour to make up with the Peking government, moved a resolution which proposed to admit Communist China in the U. N. at the same time allowing Taiwan to continue. Almost simultaneously, Albania moved another resolution which aimed at dislodging Taiwan and declaring Peking government to be the sole representative of the Chinese people. The 22-nation draft resolution led by the United States of America seeking to label the expulsion of Taiwan an "important question" requiring two-thirds majority was voted down by a margin of 59 to 55, with 15 abstentions; and later the Albanian resolution, sponsored by 22 nations, which specifically called for the immediate expulsion of the representatives of Chiang Kai-shek was passed by the General Assembly on October 25, 1971, by 76 to 35 votes, with 17 abstentions.

The All anian resolution decided to restore all its rights to the People's Republic of China and to recognise the representatives of its Government as the only legitimate representatives of China to the United Nations and called for the immediate expulsion of the representatives of Chiang Kai-shek from the place which they unlawfully occupied at the U. N. and in all the organizations affiliated to it. The U. S. A. had argued that Taiwan with 14 million people under its jurisdiction was larger than two-thirds of the U. N. members. But the opponents of the U. S. resolution pointed out that both the People's China and Taiwan were agreed on one point: There was only one China and that Taiwan belonged to China. So Taiwan was forced to withdraw.

The new Chinese delegation took its seat in the United Nations General Assembly on November 15 and in the Security Council on November 23, 1971.

The admission of China added a new colour to the scene at the U. N. and the world at large. It was apparent from even the inaugural speeches of the Chinese delegate that China wanted to be the third factor in international power equation. He lashed out both at America and the Soviet Union for their 'neo-colonialism' and hinted at China's desire to lead the 'third world, i.e. the large number of underdeveloped countries that had grown disenchanted with either or both of the super-powers, i.e. the U. S. and Soviet Union. Evidently, a new force to reckon with was born the moment China gained entrance into the U. N.

Blocking of Bangladesh to U. N. Membership.—In August 1972, China exercised her veto—an Asian country exercising its first veto against another Asian country—in the Security Council to block the admission of Bangladesh to the United Nations, when 11 out of 15 members including four permanent members had voted for her admission to the United Nations. The Charter does not, therefore, recognise to its full extent the principle of universality. It neither makes provision for compulsory membership nor grants the new States the right to become members.

The Constitution of the United Nations.—The following are the main organs of the United Nations: (1) The General Assembly; (2) The Security Council; (3) The Secretariat; (4) The Trusteeship Council; (5) The Economic and Social Council; and (6) The International Court of Justice.

 The General Assembly.—It consists of all members of the United Nations, each represented by five delegates. Rule 21 of the Rules of Procedure of the General Assembly reads:

"The delegation of a Member shall consist of not more than five representatives and five alternate representatives, and as many advisers, technical advisers, experts and persons of similar status as may be required by the delegation."

The General Assembly elects a President and seven Vice-Presidents who hold office till the close of the session at which they are elected. The General Assembly meets in regular annual sessions and in such special sessions as occasion may require. Special sessions can be convoked by the Secretary-General at the request of the Security Council or of a majority of the members of the United Nations.

Functions and Powers.—The functions of the General Assembly are laid down in Articles 10 to 17 of the Charter. The Assembly may initiate discussion on any question within the scope of the Charter and recommend to the members of the United Nations or to the Security Council or to both on any such questions. It may discuss any questions relating to the maintenance of international peace and security brought before it by any member of the United Nations or by the Security Council or by a non-member State and make recommendations with regard to any such questions to the State or States concerned or to the Security Council or to both. Oppenheim observes that although the Assembly is not invested with legislative powers and its recommendations are not legally binding, they provide an important instrument for making the weight of the public opinion of the world bear upon the members of the United Nations.

The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security. It can recommend measures for the peaceful adjustment of any situation, which is likely to impair the general welfare or friendly relations among nations.

In 1947 the General Assembly created an Interim Committee (the so-called "Little Assembly") to assist it in its duties with regard to maintenance of peace and security. The Interim Committee keeps a watching brief over all matters of peace and security and thus enables the General Assembly to discharge its functions in relation to peace and security effectively, of course, without impinging on the authority of the Security Council.

Article 13 of the Charter specially provides that the General Assembly shall initiate studies and make recommendations for the purpose of (a) promoting international co-operation in the political field and encouraging the progressive development of International Law and its codification and (b) promoting international co-operation in the economic, social, cultural, educational

and health fields and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. The Assembly is accordingly responsible for discharging the functions and powers of the United Nations with respect to international economic and social co-operation. The Economic and Social Council works under its authority. Agreements negotiated by that Council to bring specialized intergovernmental organizations in the economic, social, cultural and health fields into relationship with the United Nations are subject to approval by the Assembly. The Assembly is empowered to make recommendations for co-ordinating the policies and activities of these specialized agencies.

Article 12, however, limits the functions of the Assembly inasmuch as it provides that while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so requests.

Other functions which have been assigned to the General Assembly are with respect to the international trusteeship system, including the approval of the trusteeship agreements for areas not designated as strategic. It considers the Secretary-General's summaries and analysis of information transmitted by members administering non-self-governing territories not placed under the trusteeship system, and is assisted in this consideration by a Special Committee established by it for the purpose.

It considers and approves the budget for the Organization and apportions the expenses among the menders. It examines the financial and budgetary arrangements with specialised agencies, participates (Ly a system of parallel voting in conjunction with the Security Council) in the election of the 15 Judges of the International Court of Justice, elects the ten non-permanent members of the Security Council (Art. 23), the 27 members of the Economic and Social Council (Art. 61) and some members of the Trusteeship Council. It appoints the Secretary-General upon the recommendation of the Security Council, and frames regulations for the appointment of the staff of the Secretariat. It can expel a member of the United Nations for violation of the principles of the Charter upon the recommendation of the Security Council.

It also performs international legislative functions, inasmuch as it has already approved and adopted the texts of several international conventions, including the Conventions on the Privileges and Immunities of the United Nations, 1946, and of the Specialised Agencies, 1947, and the Genocide Convention, 1948. The Geneva Conference on the Law of the Sea, 1958, the Vienna Conferences of 1961, 1963 and 1968-69 on Diplomatic Relations, Consular Relations and the Law of Treaties resulting in Conventions on these subjects bear eloquent testimony to its achievements in that field.

Voting Procedure.—Each member of the General Assembly has one vote. Decisions of the General Assembly on important questions, e. g., re ommendation with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of the members of the Trusteeship Council, the admission of new members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of members, questions relating to the operation of the trusteeship system and budgetary questions require a two-thirds majority of the members present and voting. Decisions on other questions including the determination

of additional categories of questions to be decided by a two-thirds majority, require only a majority of the members present and voting.

Organization.—The work of the General Assembly is mostly done in committees, which are mainly four in number, tiz, main committees, procedural committees, standing committees and ad hoc committees.

- 1. Main Committees.—These Committees consider agenda items referred to them by the Assembly and make recommendations to its plenary meetings. The main committees are six in number, viz., First Committee (Political and Security, including the Regulation of Armaments), Second Committee (Economic and Financial), Third Committee (Social, Humanitarian and Cultural), Fourth Committee (Trusteeship, including Non-Self-Governing Territories), Fifth Committee (Administrative and Budgetary), and Sixth Committee (Legal). Each member has the right to be represented on each of the main committees.
- Procedural Committees.—These committees deal with the organization and conduct of the Assembly's business. Such committees are two: General Committee and Credentials Committee.
- 3. Standing Committees.—These committees deal with continuing problems. Some of these are Advisory Committee on Administrative and Budgetary Questions, Committee on Contributions, Board of Auditors, Investments Committee and United Nations Staff Pension Committee.
- 4. Ad Hoc Committees.—The Assembly or any of its committees may appoint committees for special purposes. Several such committees were set up by the Assembly, e.g., United Nations Special Committee on the Balkans, United Nations Commission for the Relief and Rehabilitation of Korea, United Nations Conciliation Commission for Palestine, etc.

Finally there is an Interim Committee, also known as "Little Assembly", originally set up by the Assembly in 1947. It assists the Assembly in carrying out its functions. Although established originally for a year, and subsequently extended for another year, it was re-established in 1949 for an indefinite period and meets when the Assembly is not actually in regular session. It assists the General Assembly in its duties in relation to maintenance of peace and security. It carries out the necessary preparatory work in regard to matters coming before the General Assembly.

Withdrawal from the United Nations.—The United Nations Charter does not make provision for the withdrawal of a member. The Dumbarton Oaks proposals for the establishment of a General International Organization drafted by the United States, the U. S. S. R., Great Britain and China had completely omitted provisions for withdrawal, perhaps as a safeguard against the weakness of the League Covenant, which permitted withdrawal after two years' notice provided that all the international obligations and the obligations under the Covenant of the member shall have been fulfilled at the time of its withdrawal. (Article 1, para. 3 of the Covenant). The Covenant further made a provision permitting withdrawal on the member signifying its dissent from any amendment to the Covenant. (Article 26 of the Covenant).

A sub-committee appointed at the San Francisco Conference on May 21, 1945, in which the four Great Powers were represented considered the question of withdrawal from the Organization and opined that they should resort to an interpretative declaration which included, inter alia, the following statement, and which was approved by Commission I and later by the plenum of the Conference at its meeting of June 25, 1945:

"The Committee deems that the highest duty of the nations which will become members is to continue their cooperation within the Organization for the preservation of international peace and security. If, however, a member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other members, it is not the purpose of the Organization to compel that member to continue its co-operation in the Organization; nor would it be the purpose of the Organization to compel a member to remain in the Organization if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept, or if an amendment duly accepted by the necessary majority in the Assembly fails to secure the ratification necessary to bring such amendment into effect."

The Soviet Union claimed that the right of withdrawal was inherent in the sovereignty of a State, but this contention was not acceded to by the Commission that presented its report to 9th Plenary Session of the San Francisco Conference.

The question that requires consideration is whether a member nation in the absence of any specific provision in the Charter has a right to withdraw from the Organization. Dr. Pasvolsky, who was Special Assistant to the Secretary of State for International Organization and Security Affairs at the San Francisco Conference, opined that under the original Dumbarton Oaks proposals, where there was no provision either to allow withdrawal or to veto withdrawal, it followed, as a matter of law, that there was a right of withdrawal, the reason being that the agreement was not of a type which in any sense merged the member States into a new government or under which they give up any of their independence. It may also be stated that in one view of the matter in an organization of sovereign States all members possess the faculty of withdrawal; that the power to withdraw is implicit in the Charter and the mention of the same in the Committee's report should be sufficient to underline it and that the faculty of withdrawal is inherent, being an expression of State sovereignty.

The other view is that since the League Covenant recognized withdrawal as an absolute right which any member could exercise for any reason, or even without reason, there must be sufficient justification in the case of the Charter where withdrawal might be considered permissible. The withdrawal in order to be justified must fall within the ambit of the clausula rebus sic stantibus. This doctrine permits withdrawal on account of a vital change of circumstances, such circumstances imperilling the existence of the State which demands itself to be released from the obligation of the Organization. But such withdrawal cannot be unilateral. The State wishing to withdraw must first make a request to the Organization to release it from membership. Kelsen observes that the clausula rebus sic stantibus does neither confer upon the members the right of withdrawal as an expression of their sovereignty nor a right to withdraw under exceptional circumstances.<sup>1</sup>

In the absence of a withdrawal clause one is left with the problem of ascertaining what obligations the parties intended to assume in this respect. In the case of the U. N., which contains no withdrawal clause due to the desire of the parties to emphasise their aspirations to stability and permanence, it is nevertheless clear from the travaux preparatoires that the right to withdraw "in exceptional circumstances" (to use the phrase of the report of Committee 1/2) was conceded. Dr. Bowett is, however, of the view that it is clear that mere

UNCIO, Doc. 1178, I/2/76 (2), p. 5.

<sup>1.</sup> Hans Kelsen The Law of the United Nations, p. 128.

silence on the question of withdrawal is not adequate to deprive a member of

The matter came to the fore when Indonesia, in view of the election of Malaysia to be a member of the Security Council under the split-term agreement of 1963 on the vacation of the seat by Czechoslovakia for a one-year term from January 1, 1965, and in pursuance of her confrontation policy against Malaysia notified her withdrawal from the United Nations membership. same arguments were advanced that there appeared to be no provision in the United Nations Charter for any country that has signed it to withdraw from the body and that in contradistinction to the Covenant of the League Nations the Charter does not provide for the termination of membership voluntarily by withdrawal. A country can no doubt boycott the Assembly or decline to obey or respect any recommen latory resolution. But there appears to be no way for a signatory to renounce obligations assumed by signing the Charter. Membership may only be terminated against the will of the member in accordance with the provisions of Art. 6 of the Charter, which provides that a member of the United Nations, which has persistently violated the principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security

An analogy may be drawn from the constitution of the World Health Organization (W. H. O.) which also does not contain any clause on withdrawal beyond a declaratory statement to the effect that a member was not bound to remain in the Organization if its rights and obligations as such were changed by an amendment of the constitution in which it had not concurred and which it found itself unable to accept. When the United States intended to join W. H. O., the two Houses of Congress expressly ruled that the United States reserved its right to withdraw from the Organization on a one-year notice. On July 2, 1948, the World Health Assembly, however, recognized the validity of the United States acceptance of the constitution.

On the 12th February, 1949, the Union of Soviet Socialist Republics feeling dissatisfied with its working notified W. H. O. that it no longer considered itself a member. The Ukranian Soviet S. R. and the Byelorussian Soviet S. R. also subsequently notified their withdrawal. The Director-General, however, informed the U. S. S. R. that Lecause the constitution of W. H. O. makes no provision for withdrawal he could not accept the communication as a withdrawal from the Organization. This stand was approved by the Assembly on the 25th June, 1949. In July 1955, however, the Soviet Union announced that it was joining W. H. O. Other States also notified their intention of joining the Organization. The only difficulty was about the arrears of contributions for the period in which the returning States had not considered themselves as members. This was resolved by accepting a token payment of 5 per cent, in full settlement of the member's financial obligations for those years in which they had not been actively participating in the work of the

Similarly, Poland, Hungary and Czechoslovakia withdrew from UNESCO between 1952 and 1954, and the Organization treated their absence as temporary cossation to participate, and a nominal budgetary contribution exacted on their resuming participation to cover their period of absence.

Feinberg observes that there exists no right to withdraw from an international organization, neither implied in the principle of sovereignty or equality nor based on the rules of a Federal State or a Confederation of States. This

Opin it.: D W. Bowett: The Law of International Institutions, Second edition, 47

right exists only if it has been recognized and such recognition need not be expressly accorded in the Constitution, although this of course is the best way to avoid differences of opinion. In other words, the right to withdraw may also be granted implicitly, i.e., it may be inferred from the contents of the treaty, from the preparatory work in its drafting, etc. It must, however, be proved in each particular case that, although withdrawal was not provided for in the instrument itself, the intention of the parties was to permit it. An instance of the right to withdraw from an international organization, despite the absence of a provision therefor in its Constitution, is the United Nations Organization; here the intention of the parties found expression in a special interpretative declaration adopted at San Francisco. Although a few authors have denied the legal validity of the interpretative declaration (see in particular Kelsen, The Law of the United Nations, p. 122), but this view, observes Feinberg, has not been ac epted and rightly so by most of the authorities. He, however, concludes on the basis of his investigation that there exists no presumption in favour of the right of unilateral withdrawal from an international organization, and that withdrawal is therefore permitted only if it is

expressly provided for or can be inferred by implication.

The matter is, however, not free from difficulty. Even W. H. O. avoided the solution of the basic constitutional problem before the Organization by not resorting to legal arguments and controversies when the Socialist Republics notified its intention of resuming active participation in W. H. O.'s work and I accepted a token payment of 5 per cent. in full settlement of the member's financial obligations for the years in which it had not been actively participating in the work of the Organization. The controversy can, therefore, be resolved only if a reference is made to the International Court of Justice for its authoritative opinion. Suffice it to say that in view of the fact that since the Charter does not contain a provision regarding the withdrawal, and the Organization is, by its nature and purpose, meant to embrace in so far as possible all the States of the world, the paramount intention is its universality and a member should not be permitted to withdraw or be allowed to escape its obligations, unless the circumstances of the case justify unilateral denunciation or withdrawal on the principle of rebus sic stantibus, and even the interpretative declaration of the sub-committie, which was approved by Commission I and later by the plenum of the San Francisco Conference, clearly envisaged that it was the highest duty of the nations which will become members to continue their cooperation within the Organization for the preservation of international peace and security and that it was not the purpose of the Organization to compel a member to continue its cooperation in the Organization if the organization is the organization in the Organiz tion if that member because of exceptional circumstances felt constrained to withdraw. It is, therefore, clear that in order to permit withdrawal from the Organization, there must be exceptional circumstances to justify the same. Such exceptional circumstances fall under the doctrine of changed conditionknown as the doctrine of rebus sic stantibus. For if the withdrawal were permits ted at the pleasure of the party concerned, it would clearly have serious effects on the international organization of the world. "The omission", says Schachter, "of the usual clause permitting denunciation or withdrawal was evidently due, not to an oversight, but to a general policy which favoured universality and deprecated unilateral action." This view is fortified by the principles of International Law enshrined in the London Protocol of January 17, 1871, in which the Great Powers declared that it was an essential principle of the Law of Nations that no power could liberate itself from the engagements of a treaty save with the consent of the contracting powers by means of an amicable engagement.

1. The British Year Book of International Law, 1963 : Unilateral Withdrawal from an

International Organization by N. Feinberg. 189, 215, 218

Indonesia notified her return to the United Nations Organization in September 1966, and resumed full participation in the work of the United Nations on September 28, 1966. The President of the United Nations stated in the Assembly that Indonesia had indicated that it considered its recent absence from the Organization based not upon a withdrawal but upon a cessation of cooperation.

"Uniting for Peace" Resolution .- The Charter was framed with the underlying idea that there shall be unity of great powers. It certainly existed at the time when the Charter came into force. It was however found later that that unity was not discernible. The U. N. police force which was provided by the Charter was to be placed under the control of the Security Council, on which sat the Great Powers with their right of veto. If, therefore, the Great Powers did not agree to stand against aggression, there was the likelihood of the U. N. system for enforcing peace by police power to break down. To tide over this difficulty, the United States brought into the General Assembly a resolution called "Uniting for Peace." On November 3, 1950, the General Assembly adopted the resolution, which provided inter alia as fellows: "If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace. breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately, with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the members of the United Nations."

The Assembly also created the Collective Measures Committee to work out in advance the organization for a prompt resistance to aggression. A Peace Observation Commission was also established by the same resolution.

The "Uniting for Peace" resolution was opposed by the U. S. S. R. as weakening the Security Council by taking away the Council's full responsibility for peace and security and evading the principle of unanimity as envisaged in the Charter by the provision of veto.

Under the powers vested in the General Assembly in virtue of the "Uniting for Peace" resolution, an emergency special session of the General Assembly was convened in the first week of November 1956 to discuss the Israel-Anglo-French attack on Egypt at the end of October 1956 after Britain and France had vetoed a United States resolution in the Security Council calling on all nations to refrain from the use of force or threat of force in Egypt.

The "Uniting for Peace" resolution altered the basic relationship between the two organs of the United Nations, viz., the General Assembly and the Security Council towards the maintenance of world peace. It enabled the Assembly to step in when the Security Council was unable to act owing to Great Power differences and to make recommendations, including those to use armed forces. The various provisions of the resolution are directed to make collective measures to restore peace and security both speedy and effective. In effect, the resolution has decided that, when any situation noticed above arises, the General Assembly, in which body important resolutions require only

a two-thirds majority of States present and voting, could take up the matter and make any necessary recommendations to the member States.

In the Congo dispute in 1960, the legality of the resolution passed by the Security Council by a vote of 8 to 2, calling Emergency Special Session of the General Assembly was challenged by the representatives of Poland and the U. S. S. R. The latter challenged it on the ground that the Uniting for Peace resolution had been adopted contrary to the provisions of the Charter which required unanimity of the permanent members of the Council in the matter of convening emergency sessions. The challenge to the legality of the Security Council resolution did not raise the question of the constitutionality of the Uniting for Peace resolution on the ground that the competence of the General Assembly was limited in that respect by Art. 11, Paragraph 2, and Art. 12 of the Charter, apparently because the U. S. S. R. had on two earlier occasions voted for calling an emergency special session of the Assembly because the Security Council had been prevented by lack of unanimity of its permanent members from exercising its primary responsibility for the maintenance of international peace and security. Those occasions were in October 1956 with respect to the item on the armed intervention in Egypt by Israel, France and the United Kingdom and in August 1958 with respect to a proposed resolution pertaining to threats to the peace in Lebanon and Jordan. That objection had not been advanced in 1956 even though two permanent members, France and the United Kingdom, had cast negative votes in respect of the resolution adopted by the Security Council on the Suez intervention.

Under Article 20 of the Charter special session shall be convoked by the Secretary-General at the request of the Security Council. That article does not preclude the convening of a special session at the request of any seven (and, now after the amendment, nine) members of the United Nations represented on the Security Council. Since however the U. S. S. R. did not subsequently challenge the legality of the Emergency Special Session in the General Assembly, the matter should be treated to have been settled and the right of the Assembly to decide in its own rules the grounds for calling a special session acknowledged.

Poland raised another objection on the ground that the Security Council had not been prevented from exercising its primary responsibility for the maintenance of international peace and security, inasmuch as it had adopted three resolutions to safeguard international peace in relation to the Congo, and as such the conditions requisite for the convoking of the Special Session had not been fulfilled. In reply it can only be stated that the fact that the Security Council had adopted three resolutions did not preclude the members from adopting a subsequent resolution of convoking a special session of the Assembly on the ground that the veto of the resolution by the U. S. S. R. providing for a United Nations Fund for financial assistance for the Congolese Government, prevented the Council from exercising its responsibility for the maintenance of international peace. The requisite condition of seven votes had of course been fulfilled.

Failing to achieve any success in the Security Council on account of the veto exercised by the U. S. S. R. in the Indo-Pak. conflict in December 1971, the United States of America took the issue to the General Assembly under a 'Uniting for Peace' resolution, and in accordance with that resolution, the General Assembly was convened on December 7, 1971. And, although the General Assembly passed a resolution calling for immediate ceasfire and with drawal of all troops on their own side of the Indo-Pakistan borders, it ultimately left the matter to the Security Council for taking appropriate action in the-

light of the General Assembly's resolution, where again there was no unanimity which could enforce the General Assembly's resolution.

In spite of the passage of the Uniting for Peace Resolution, the Council retains its legally established primacy in the maintenance of peace and the earlier stages of the Lebanon, Jordan and Congo crisis were in fact handled by the Council; but so long as the cold war (and groupings of major powers) remains intense, it is likely to be the Assembly which plays the chief role. In the Indo-Pak, conflict both the General Assembly and the Security Council failed to advance the cause of peace.

Appraisal of the work.—The General Assembly, to quote the language of Goodrich and Hambro, has not only provided a forum, but it has shown itself capable of taking decisions. It is empowered to discuss any problem falling within the jurisdiction of the United Nations and concerning "anything and everything under the sun for human welfare, human rights,

food, shelter and clothing for all."

Assembly has been able to take a leading role in questions of international peace and security. It has discussed some of the leading political problems brought before the United Nations such as those relating to Palestine, Greece, Spain, Korea, Suez and the Congo, and also taken concrete action with reference to them. For instance, in regard to Palestine it appointed a Special Committee in 1947 to investigate the facts, and subsequently in 1948 appointed a Mediator to secure peace Letween the Jews and the Arabs, and later a Conciliation Commission. In 1947, it set up mediatory and supervisory machinery to deal with the Balkans problem in the form of a Special Commission...it materially contributed to the settlement of the Suez Canal zone conflict in October-November, 1956, and in September, 1960, it au. thorised the continued maintenance in the Congo of a United Nations Force."<sup>2</sup>

The "Uniting for Peace" resolution passed by the General Assembly on November 3, 1950, has considerably enlarged the powers of the General Assembly. It has softened the edge of the veto enjoyed by the Big Five. In pursuance of the above a Peace Observation Commission and a Coll ctive Measures Committee were set up whose functions are to report on the situation in any area where international peace and security may be threatened and to consider measures which might be used collectively to maintain and strengthen international peace and security.

The General Assembly had been successful in controlling the Israel-Anglo-French aggression on Egypt in October 1956, which might otherwise

have assumed a menacing situation leading to a world war.

2. The Security Council.—The Security Council initially consisted of eleven members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, Great Britain and the United States of America are five permanent members, while six non-permanent members were elected by the General Assembly for a term of two years. Under the amendment adopted by the General Assembly on the 17th December, 1963, and which came into force on the 31st August, 1965, the Security Council shall consist of 15 members and the General Assembly shall elect ten other U. N. members to be non-permanent members of the Security Council. In the election of non-permanent members due regard is specially paid to the contribution of members of the United Nations to the maintenance of

I. J. L. Brierly: The Law of Nations, Sixth Edition, p. 118, : Opin. Cited.

J. G. Starke: An Introduction to International Law, 7th Ed., p 602,
See amendments to Arts. 23, 27 and 61, United Nations Judicial Yearbook (1965).

international peace and security and also to equitable geographical distri-

Under Art. 27 of the Charter each member of the Security Council has one vote. Decisions of the Security Council on procedural matters are made by an affirmative vote of nine members; and its decisions on all other matters are made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that in decisions concerning the pacific settlement of disputes, whether under Chapter VI or under Art. 52, paragraph 3 (reference of a dispute to regional settlement), any permanent or non-permanent member, if a party to the particuar dispute under consideration, must abstain from voting.

The Charter also provides that any member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that member are specially affected. Similarly, any member of the United Nations which is not a member of the Security Council or any State which is not a member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute.

The Presidency of the Security Council is held in turn by the members of the Security Council in the English alphabetical order of their names. Each President holds office for one calendar month.

Powers and Functions of the Security Council.—The performance of almost all legally important functions of the United Nations is conferred upon the Security Council acting either exclusively or in consultation with the General Assembly. The primary responsibility for the maintenance of international peace and security has been conferred by the members of the United Nations on the Security Council. The Security Council is an organ of the United Nations. It has more or less to perform the work of an executive nature. It, therefore, acts on behalf of the United Nations and under Article 25 of the Charter the members of the United Nations have undertaken to accept and carry out the decisions of the Security Council.

Pacific and Compulsive Settlement of Disputes.-The Council performs duat functions. It investigates disputes under Chapter VI of the Charter and it takes action with respect to breaches of the peace under Chapter VII. Under Chapter VI the Security Council, when it deems necessary, calls on the parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, to seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Should the parties to a dispute of the nature referred to above fail to settle it by the means indicated, the Security Council decides whether to recommend appropriate procedures or methods of settlement or whether to recommend the actual terms of settlement. Security Council may also investigate any dispute or situation which might lead to international friction either of its own motion or on reference being made by any member of the United Nations, by a non-member who is a party to the dispute, or by the General Assembly or by the Secretary-General. The various activities of the Security Council hitherto undertaken in the direction of pacific settlement of disputes relate to calling upon the Netherlands and Indonesia to cease hostilities in 1947, Good Offices Commission in the Indonesian case pursuant to a resolution of the Security Council of

the 25th August, 1947, appointment of a mediator and subsequently a commission of conciliation with regard to the question of Palestine and its efforts to reach an amicable settlement in the Indo-Pakistan dispute.

Under Chapter VII the Security Council determines the existence of any threat to the peace, breach of the peace or act of aggression and makes recommendations or decides what measures shall be taken to maintain or restore international peace and security. The measures that may be taken by the Security Council fall within the purview of enforcement action and are of two kinds. The first consists of measures not involving the use of armed force as provided in Article 41. The Security Council may call upon, under the provisions of this article, the members of the United Nations to apply such measures as interruption of economic relations and of means of communications and the severance of diplomatic relations. The second kind of measures is applied under Article 42 when the measures provided for in Article 41, as mentioned above, prove inadequate and may consist of such action by air, sea or land forces as may be necessary to maintain or restore international peace and security, including blockade. With a view to carrying out these obligations all members of the United Nations have undertaken to make available to the Security Council, on its call and in accordance with special agreement or agreements armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. Article 45 of the Charter provides for Military Staff Committee, composed of the Chiefs of Staff of the live permanent members to advise and assist the Security Council in regard to military aspects of enforcement action. In order to enalle the United Nations to take urgent military measures, members have also undertaken to hold immediately available national air-force contingents for combined international enforcement action.

The Security Council for the first time exercised preventive or enforcement action in the Korean War when by its resolutions of June 27 and July 7, 1950, it condemned the aggression of North Korea and asked the members to provide military forces and other assistance and make them available to a unified command under the United States. The resolution of July 17 requested the United States to designate the commander of such forces and authorized the unified command at its discretion to use the United Nations Flag. The forces of the Korean Republic were assisted by American fighters and bombers. The United Nations further placed an embargo on the export of strategic materials to the Communist China and North Korea by the members and non-membe States. Prior to this the Security Council in the cases of Palestine, Indonesia and Kashmir only confined itself primarily to the task of bringing about ceasefire by agreement of the parties.

It is, however, still uncertain as to how far enforcement action will be effective when appplied by the United Nations on the failure of a nation to settle a dispute by peaceful means. Under the Charter no enforcement action is possible except through the Security Council. In the Security Council the Big Five have the veto right, and consequently enforcement action against a great power is totally excluded.

The three resolutions of the Security Council providing for enforcement measures against North Korea could be adopted in the absence of one of the permanent members of the Security Council. Under Article 27 (3) as amended decisions of the Security Council on all matters other than procedural are made by an affirmative vote of nine members, including the concurring votes of the permanent members. The Soviet Union, therefore, challenged the legality of the resolutions at the 482nd meeting of the Security Council on the ground that

the decisions of the Council could be lawful only if its five permanent members participated and concurred in the same. And since the representative of the U. S. S. R. was absent and that Chinese People's Republic was not represented, the resolutions adopted by the Security Council under the dictate of the United States delegation and in breach of the United Nations Charter had no legal force. This contention, although negatived, seems to have some force.

The action taken in Korea falls within the ambit of compulsive settlement of a dispute by the United Nations.

Dr. Murray remarks: "The security clauses, providing the new Organization with 'teeth' of enormous size and instantaneous action, have been generally applauded as putting the new Chrater on quite a different level of practical efficiency from the old Covenant. And so it might well seem on first reading. But reflection raises doubts and even suspicions. The only Powers possessing or likely to possess enough forces to put the peace of the world in peril have armed themselves to the full and insisted that the great Peace Organization shall have no authority over them. They make certain general promises of good behaviour, but remain free to do as they like. Meanwhile we are expected to congratulate ourselves that the new League has 'teeth'.

The other functions of the Security Council are in relation to regional agencies and regional arrangements for pacific settlement of local disputes. The Security Council also controls and supervises trust territories which are classified as strategic areas. It also recommends to the General Assembly admission, suspension and expulsion of members. It also deals with amendments to the Charter (Arts. 108-109) and election, in conjunction with the General Assembly, of the 15 Judges of the International Court of Justice.

Voting Procedure in the Security Council.—Each member of the Security Council has one vote. Decisions of the Security Council on procedural matters are made by an affirmative vote of nine members. Decisions of the Security Council on all other matters are made by an affirmative vote of nine members, including the concurring votes of the permanent members. In these cases the permanent members' affirmative vote is necessary in favour of a particular decision, otherwise that decision is blocked or vetoed and falls through.

Veto Right. - The question of the permanent member's right of veto has assumed much importance and bears some discussion. It was originally planned at the San Francisco Conference that special responsibilities for the maintenance of international peace and security lay on the Five Great Powers. President Roosevelt, who was most responsible for mooting the idea of a world organization in the last days of the Second World War, thought that it was essential for the great powers to pull together in the post-war period and this could be achieved only if they co-operated and did not fight each other. He foresaw that it was not possible for great powers like the U.S. A. and U.S.S. R. to come into an assembly where a number of small countries could just come together and by the sheer force of majority ask them to do this or that. He realised that they were differently constituted and that there was difference in their economic and social systems. It was a very difficult thing for great nations to take a risk of that sort and, therefore, the veto became essential in that state of the world, otherwise there could not be the United Nations at all. So they accepted that as representing a certain unfortunate reality. The veto, therefore, meant that the United Nations could not or should not try to coerce any of the Big Powers, because if they tried to do so by voting strength, that power would veto it. It meant, in other words, that any attempt to coerce

<sup>1.</sup> Dr. Gilbert Murray : From the League to U. N., p. 159.

a great power inevitably meant a world war and the idea was to avoid that world war and keep the dispute and conflict on the level of the conference table and not the field of battle.1 The justification for affording this special or exceptional status to the five members, viz; that of permanence and special voting rights, lies, to adopt Jessup's phrase, in the "inescapable fact of power differentials".

Under the Charter no enforcement action is possible except through the Security Council. In the Security Council the great powers have got the veto right and consequently enforcement action against a great power is totally excluded. Kelsen observes that the veto right of the five permanent members of the Security Council, which places the privileged powers above the law of the United Nations, establishes their legal hegemony over all the other members of the Organization and thus stamps on it the mark of an autocratic or aristocratic regime. He further observes that the Charter proclaims as its first principle the sovereign equality of all its members. There is an open contradiction between the political ideology of the United Nations and its legal constitution. And this contradiction may completely paralyse the great advantage that the Charter tried to gain over the Covenant by conferring upon the Security Council a power almost equal to that of a government.2

The veto was established with the hope that the big powers would succeed to maintain an understanding, which they exhibited during the war, to ensure a harmonious and smooth working of the organization. It was thought preposterous to arm a small country like Iceland with the same voting right as, and a voice equal to that of, the Soviet Union, U. K. or the United States, without regard to the size, population or strength of the various countries. The cherished hope of maintaining cordial relations among the permanent members of the Council had been belied, and a cold war between the United States and Soviet Russia blocked the progress of the U. N. towards its goal of achieving international co-operation.

At the San Francisco Conference, the Four Sponsoring Powers, viz. Great Britain, the United States, Russia and China, issued a Joint Interpretative Statement pleading for retention of the veto, adding at the same time that the Great Powers would not use their powers 'wilfully' to obstruct the operations of the Security Council. The hopes haves no doubt been belied. Starke sums up the following as being "subject to the right of exercise of the veto :- (a) the actual decision whether a question to be put to the vote is one of procedure or of substance (and if a permanent member should veto such a decision, there arises 'double veto'); (b) any executive action; (c) a decision to carry out any wide investigation of a dispute. But the mere preliminary discussion of a subject, decisions on purely preliminary points, and the hearing of statements by a State party to a dispute would not be within the scope of the veto."3

Veto in the early stage of the formation of the U. N. enabled the big powers to safeguard their foreign or domestic policy from the majority decisions of the United Nations. It was regarded as a "defence against 'involuntary servitude,' a complete answer to any rational fears of subordinating the destiny of big powers to alien commands and a guarantee of perpetuated independence of international dictation." Russia is no doubt very averse to curtailing her rights of veto to any degree and even well-meant attempts to smooth the operation of the Security Council is regarded by her with suspicion. But her suspicion, observes Erich Hula,4 is easier to understand since we have not

2. Hans Kelsen The Law of the United Nations, pp. 276-277

48

<sup>1.</sup> Opin.cit. Jawaharlal Nehru in the Subjects Committee of the All-India Congress, dated September 18, 1950.

<sup>3.</sup> J. G. Starke: Introduction to International Law, Seventh Edition, p. 609.
4. Erich Hula: "Four Years of the United Nations" -Repr. nt Hartmann: Readings in International Relations, p. 171.

been fair to the Russians with regard to her veto policy. If the Russians have abused the veto, we have not failed to abuse their abuse. To be sure, in a few cases the exercise of the veto was clearly intended to protect the Soviet satellites; in the great majority of other cases Russia's motive was to maintain her relative power position in the United Nations rather than to obstruct its activities: vetoes were also directed against the admission of new members to prevent an increase in the size of the majority in the General Assembly; and the remaining vetoes were applied to prevent any formal action which, directly or by implication, would increase the competence of the General Assembly.

In order to curb the effect of veto, the General Assembly at its 302nd Plenary Meeting on Novembere 3, 1950, resolved—against the views of the U. S. S. R.—that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommedations to members for collective measures, including in the case of a breach of the peace or act of aggression-the use of armed force when necessary to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the members of the United Nations.

In the Competence of the General Assembly for the Admission of a State to the United Nations M. Alvarez in his dissenting opinion observed that "to decide that the right of veto may be freely exercised in every case in which the Security Council may take action would mean deciding that the will of a single Great Power could frustrate the will of the other members of the Council and of the General Assembly, even in matters other than the maintenance of peace and security; and that would reduce the U. N. O. to impotence."

Double Veto.-We have seen eariler that under Art. 27 each member of the Security Council has one vote. Decisions of the Security Council on procedural matters are made by an affirmative vote of nine members. Decisions of the Security Council on all other (that is, substantive) matters are made by an affirmative vote of nine members, including the concurring votes of the permanent members, except that any member must abstain from voting in decisions concerning the pacific settlement of a dispute to which it is a party. A negative vote by a permanent member on a matter which is not procedural (that is a substantive matter) is popularly referred to as a 'veto'. In practice, a permanent member's voluntary abstention from voting on a substantive question is not regarded as a 'veto'. It was the absence of the Soviet Union, one of the permanent members, from the Security Council that enabled the latter to adopt the three resolutions on Korea, dated the 25th June, the 27th June, and the 7th July, 1950. The legality of this practice was Confirmed by the International Court of Justice in the Advisory Opinion of June 27, 1971, on the Legal Cansequences of the Continued Presence of South Africa in Namibia (South West Africa) wherein it had ruled that the Security Council resolution of 1970 declaring illegal the continued presence of South Africa in South West Africa, was not invalid by reason of the abstention from voting of its two permanent members.

A noteworthy feature of the voting procedure in the Security Council is the distinction drawn between procedural matters on the one hand and matters of substance on the other. The text of the Charter does not define either of the two categories. A set of interpretative rules was drawn up in the

form of an agreed Statement by the Great Powers in 1945 in answer to a questionnaire of 23 items. The San Francisco Conference did not take any formal action on that Statement, with the result that the same, though binding in practice, has no legal authority on any organ of the United Nations. Accordingly the matters which are prominently procedural fall within a narrow range, these including the time and place of Security Council meetings, the setting up of subsidiary organs, the adoption of rules of procedure invitations to members of the United Nations as represented on the Council, or such other organizational steps which are necessary to enable the Security Council to function continuously. The Interpretative Statement did not, however, limit the procedural matters which were exempt from the operation of the veto. But the limit has been set by a different rule which has come to be known as 'Double Veto', an expression which, like the term 'veto', is not to be found in the text of the Charter at all. Where a permanent member should use the veto on the actual decision whether a question to be put to the vote is one of procedure or of substance, there arises a double veto. As has been lucidly explained by Andrew Martin and John B.S. Edwards, "in borderline cases, the preliminary question whether a matter is procedural is itself subject to the veto. In fact, that rule turns the veto into what has been rightly called a 'double veto'; first a negative vote is cast to prevent the Council from treating question as procedural, and a vote is then cast for the second time to defeat the substance of the motion." This device has been utilised by the Soviet Union on occasions more than one in order to stulitfy the majority. The most notable instance of the use of 'double veto' is furnished by the case of the Communist coup in Czechoslovakia when on the request of the permanent representative of Czechoslovakia, Dr. Jan Papanek, tor an investigation of events preceding and succeeding the change of Government in Czechoslovakia on February 22, 1948, the matter was taken up by the Security Council in March 1948. Dr. Papanek charged that his country's independence had been violated by threat of force by the U. S. S. R. and that the coup had been carried out with the direct and indirect participation of the U. S. S. R. A Chilean proposal to appoint a sub-committee to receive evidence to enquire whether the Czechoslovak situation endangered international peace and security was lost by the use of the double veto by the U. S. S. R. at the meeting of the Council held on the 24th May, 1948. Despite eight affirmative votes, the French President of the Security Council declared the question as to whether the vote thereon would be procedural, to be lost, and the resolution to be therefore not procedural, on the basis of the Statement of the Sponsoring Powers? since the Soviet Union voted against it.

The complications arising out of the use of the double veto evoked serious consideration by the General Assembly in 1948, and it recommended to the Security Council to accept the procedural character of at least 45 types of decision with a view to exempting them from the operation of the double veto. That recommendation was, however, not accepted by the Security Council, with the result that "the veto can be lawfully east in every field outside the short list of questions which were deemed procedural by the Interpretative

Statement of June 1945."

The arbitrary power of each permanent member to convert "procedure" into substance could however be avoided by Rule 30 of the Council's Provi-

1. Andrew Martin and John B. S. Edwards: The Changing Changing Charter, p, 79.

2. The Statement of the Sponsoring Powers declared that "it will be unlikely that there will arise in the future any matters of great importance on which a decision will have to be made as to whether a procedural vote would apply. Should however, such a matter arise, the decision regarding the preliminary question as to whether or not such a matter is procedural must be taken by a vote of seven members of the Security Council, including the concurring votes of sional Rules of Procedure which required seven votes of dissent from it to overrule presidential ruling which was challenged.

Another occasion for the use of double veto arose in the Formosan case on the 29th September, 1950, on an Ecuador resolution to invite a representative of the People's Government of China to attend discussions of the Formosan question raised by that Government. The British President, on a vote of seven in favour and three (including Nationalist China and the United States) against, ruled the resolution adopted. The Chinese Nationalist delegate contended that his negative vote was a veto by virtue of the Statement of the Sponsoring Powers, and the earlier double veto precedents. At the next meeting, the British President asked for a vote whether the Ecuador was procedural. Nine votes were in favour, China voting against; the President ruled the resolution procedural, and therefore adopted despite the Chinese veto. The Chinese delegate asserted the force of his negative vote, and demanded that the matter be submitted for advisory opinion of the International Court of Justice. The President treated this as a motion of dissent from his ruling under Rule 30, and, in the absence of a vote of members overruling it, declared that his ruling must stand.

Self-Defence.—Article 51 of the Charter recognizes the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Such measures taken in self-defence are to be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. But this right of self-defence arises only (1) in case of an armed attack (and must not be used for any other violation) and (2) the absence of assumption of responsibility by the Security Council. Thus an alarming military concentration by a neighbouring State would not justify the State whose peace is threatened to resort to force by the process of self-defence. It will only entitle it to report such concentration, as is likely to affect or threaten international

peace and security, to the Security Council.

Anticipatory self-defence is not warranted by the provisions of Art. 51 of the Charter, although the general practice of States points the other way. Pakistan rested her case with regard to the entry of her troops in Kashmir in 1948 on anticipatory self-defence. Israel's invasion of Sinai in October 1956, and then in June 1967, and, finally, the invasion of Czechoslovakia by the U. S. S. R. in 1968 were also in pursuance of the supposed right of self-defence. Israel's claim that all her military actions were essentially in the nature of self-defence, for she has been in a state of self-defence since 1948, which would continue until the Arab Governments agreed to end the war waged against Israel and conclude peace, was considered by the Security Council on several occasions; but the Security Council formally condemned Israel for illegal reprisals and rejected the plea of self-defence.

The Charter, therefore, forbids any use of force on the part of the individual members except for the exercise of the right of self-defence against an armed attack.

According to the provisions of Art. 51, "the right of individual or collective self-defence shall have precedence in fact over the functions assigned

to the organs of the United Nations."

The provisions with regard to the self-defence in the U. N. Charter differ materially from those provided in the Covenant of the League of Nations. The Covenant reserved to the members the right of self-help in all cases in which the League proved unable to settle the dispute.

Legal Status of the Organization.-Kelsen observes that the United Nati ns possesses juridical personality in the field of International Law as well as in the field of the national law of the Member States, and as such is capable of being a subject of legal duties and legal rights, of performing legal transactions and of suing and being sued at law. The United Nations has the power to enter into those international agreements which it is authorised by special provisions of the Charter to onclude. The Security Council has almost the character of a governmental body. Under Article 26 of the Charter it has been empowered to formulate plans to be submitted to the members of the United Nations for the establishment of a system for the regulation of armaments. Then, Article 104 confers on the Organization juridical personality in the field of national law by providing that the Organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.1 Article 43 provides for agreements between the Security Council and the members of the U. N. for making available to the Security Council armed forces, assistance and facilities for the purpose of maintaining international peace and security. Article 81 authorises the U. N. to exercise jurisdictional and legislative powers with regard to territories under the trusteeship agreement.

The Organization enjoys in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes. Representatives of the members of the United Nations and officials of the Organization also enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

The Convention of 1946 on the Privileges and Immunities of the United Nations provides as follows: The United Nations shall possess juridical personality. Its property and assets shall enjoy immunity from legal process except when that immunity is waived. The premises and archives of the United Nations shall be inviolable and its property and assets shall be free from all direct taxes and customs duties. In regard to its official communications, the United Nations shall enjoy treatment in the territory of each member State which is no less favourable than that accorded by the government of that member to any other government. The representatives of members, officials of the United Nations, and experts on missions of the United Nations shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions. And, lastly, the United Nations may issue United Nations laisset passer to its officials which shall be recognized and accepted as valid travel documents by the member States.

The Organization thus enjoys functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is, as observed by the International Court of Justice, the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. Its members by entrusting certain functions to it with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged. It proceeds essentially on the basis of voluntary cooperation by the members and "commands" only in the limited field of enforcement action via the Security Council. This reliance on cooperation is a characteristic of an organisation to which sovereign powers are not delegated by the members.

1. Hans Kelsen : The Law of United Nations p. 329.

<sup>2.</sup> Opin cit D. W. Bowett . The Law of International Institutions, Second Edn. 1970,

Fenwick observes that clearly the United Nations is not a 'superstate', or anything resembling a world government, for Article 2 of the Charter proclaims that the Organization is based on the principle of the sovereign equality of all its members. But it is clear that the United Nations, like its predecessor the League of Nations, is to have a definite legal personality, a corporate character of its own apart from that of its individual members. Like the League it will be able to take title to property in its own nane; it will be able to enter into contracts as a corporate body and acquire rights and assume obligations; it will be able to administer public international services and to act as trustee for individual States; it will be able to govern territory through its designated agents and to act as guardian and protector of a dependent international person.1 As regards the question whether the term "confederation" can be used for the United Nations, Fenwick points out that it is an academic question that can be left for future discussion. Oppenheim is of the view that the U. N. approximates more closely to a confederation than to a Federal State. "This is so in particular in view of the right of withdrawal from the Organization, of the practical non-existence of any true legislative powers vested in the United Nations, and of the virtual absence of any direct relation between the United Nations and the nationals of the member-States."2

It was observed by the International Court of Justice in the Reparation for Injuries Suffered in the Service of the United Nations3 that the "Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is 'a super-State,' whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of International Law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims." It is a juristic person sui generis.

The International Court of Justice has held that the United Nations is a legal entity separate and distinct from the member States. While it is not a state nor a super-State, it is an international person, clothed by its members with the competence necessary to discharge its functions.

The competency of the United Nations to sue the United States in Federal Court under the Suits in Admiralty Act formed the subject of decision in Balfour Guthrie & Company v. United States and the United States District Court observed that the broad purpose of the International Organizations Immunities Act was to vitalize the status of international organisations of which the United States is a member and to facilitate their activities. Further, Article 104 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. As a treaty ratified by the United States, the Charter is part of the supreme law of the land. The Court accordingly held that the capacity to institute legal proceedings conferred on the United Nations by the International Organizations Immunities Act includes the competence to sue the United States in cases in which the United States has consented to suits by other litigants.

<sup>1.</sup> Charles G. Fenwick: International Law, pp. 182-183. Oppen heim: International Law, Vol. I, 8th Ed., p. 423.
 I. C. J. Reports (1949), p. 174.
 1950, 90 F. Supp. 831.

Relation of the United Nations Assembly with the Security Council.—The Security Council has almost the character of a governmental body. It is concerned primarily, as observed by Oppenheim, with preserving and maintaining international peace and security. The General Assembly, on the other hand, is largely a deliberative organ concerned with the totality of matters coming within the scope of the United Nations.1 The Security Council has the exclusive jurisdiction with regard to any dispute or situation which is likely to endanger the maintenance of international peace and security. The General Assembly, no doubt, receives and considers under Article 15 annual reports from the Security Council with regard to the measures that the latter has decided upon or taken to maintain international peace and security. Oppenheim remarks that the Charter does not contemplate that in receiving and discussing such reports the General Assembly shall pass judgment upon the activities of the Security Council in a manner amounting to an assumption of concurrent jurisdiction in the matter of settling disputes or to a subordination of the Council to the overriding authority of the Assembly.

With regard to many matters the Assembly works in conjunction with the Security Council, e. g., admission and expulsion of members, the appointment of the Secretary-General, and election of the Judges of the International Court of Justice.

The Security Council is an almost continuously functioning body, while the General Assembly consisting of a large number of members meets only in regular annual sessions or in special sessions convoked by the Secretary-General at the request of the Security Council or a majority of the members of United Nations. By virtue of the nature of work that they perform the delegations of members of the U. N. who come to attend the session of the Assembly are composed mostly of political persons, while the Security Council consists of diplomats and officials. The Assembly debates assume the character of parliaments, while the Security Council meetings look like diplomatic meetings.

The Assembly consisting of 132 nations is more representative and focuses greater attention to the weight of public opinion than the 15-member Security Council.

The passage of the 'Uniting for Peace' resolution in 1950 has, however, drastically altered the relationships originally intended to be established by the Charter between the Security Council and the Assembly, and has enabled the Assembly to wield wide powers when because of the lack of unanimity of the permanent members, the Security Council fails to exercise its primary responsibility for the maintenance of international peace and security, in any case where there appears to be a threat to the peace, breach of the peace, or

Law in the United Nations.-The Charter of the United Nations accepts the lofty principles of International Law and envisages justice and tolerance, the equal rights of men and women, respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion, respect for the obligations arising from treaties and other sources of International Law and the equal rights of all nations, both great and small. The operative articles of the Charter, however, belie any such high

The Charter subordinates the majesty of law to the right of absolute power afforded to the Big Five. It establishes the supremacy of the big powers

1. Oppenheim: International Law, Vol. I, p. 455.

and relegates the smaller nations to the background. Article 2 (1) of the Charter no doubt bases the Organization on the principle of the sovereign equality of all its members but the various provisions virtually in the result authorise only the great powers to deal with one another on an equal footing.

Professor Smith observes that the doctrine that supreme power is above all law finds expression in the Charter in two ways, which may be described as the positive and the negative expression of the same principle. According to him, "all power is vested in the Security Council and can be exercised by seven (and, after the amendment of Art. 27 of the Charter, nine) members of the Council, provided that these include all the "Big Five". Assuming that a majority so constituted can be obtained, the Charter imposes no legal limits whatever upon what the Council may do. This is the positive expression of its principle. In its decision the Council is not bound to observe any rules of law or to respect the provisions of any treaties...... The decisions of the Council, in so far as it can agree upon any decisions, will not be controlled by law, but will be in themselves the source of law. Law thus becomes the voice of power, and the procedure of Munich, if not the actual decision, is now consecrated by the Charter of the United Nations." The above is, however, subject to the condition that this power becomes powerless if it is not unanimous.

"The negative aspect of the doctrine finds expression in the so-called 'veto,' the principle that no positive action can be taken against a Great Power without its own consent." The principle of unanimity reminiscent of the League Covenant and other international proceedings can no longer be invoked except by the Big Five who are permanent members of the Council. If the Big Five can secure the support of two (and, now after the amendment of Art. 27 of the Charter, four) other numbers of the Security Council, all the remaining members of the United Nations are deprived of the protection which they formerly enjoyed under the traditional rule of unanimity. They have only a right to be heard but beyond this they have no control, and the whole body of members is pledged to support and enforce any decision at which the Council may arrive."

U. N. and the League.—The Covenant of the League of Nations was part of the Treaty of Versailles and was bound up with its fulfilment. All the powerful nations that joined the League in the early days did so in the sense that they wanted something to buttress existing treaties and existing territorial settlements. The birth of the United Nations is not related to the treaty of peace imposed upon the vanquished nations but relates to the determination of the peoples of the United Nations to save succeeding generations from the scourge of war.

Apart from their origin the purposes of both the League and the United Nations are fundamentally the same, viz., to preserve international peace and security by encouraging settlement of disputes among nations by amicable means without resort to force.

The League of Nations was first conceived in order that "the principle of public right take precedence over the individual interests of particular nations." President Woodrow Wilson conceived the League of Nations as "the eye of the nations to keep watch upon the common interest, an eye that does not slumber, an eye that is everywhere watchful and attentive." The idea of a world organization as originally conceived at the time of the formation of the League of Nations is far more firmly established by means of the United Nations than it ever was in the years of the League of Nations.

<sup>1.</sup> H. A. Smith: The Crisis in the Law of Nations, p. 88-92.

In the United Nations there are six principal organs, viz., the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the Secretariat, while the League had only three principal organs, viz., the Assembly, the Council and the Secretariat. The League, therefore, primarily confined itself to political activities, while in the U. N. more emphasis has been laid on the economic, social, cultural and humanitarian matters which are so intimately related to the happiness of the mankind. The present organization lays emphasis on the development of human personality and the preservation of the fundamental right of the individuals. The United Nations Educational, Scientific and Cultural Organization (U. N. E. S. C. O.), the World Health Organization (W. H. O.), the International Bank for Reconstruction and Development and the International Monetary Fund are all designed to secure economic, social and cultural unity of mankind. The preamble to the U. N. E. S. C. O .- "Since wars begin in the minds of men it is in the minds of men that foundations of peace must be laid"-further lends countenance to the humanitarian character of the U. N.

Under the Charter, decisions of the General Assembly on important questions require a two-thirds majority of the members present and voting, while decisions on other matters require only a majority of the members present and voting. In the Security Council decisions on procedural matters require only an affirmative vote of seven (and, now after the amendment of Art. 27, nine) members, while decisions on all other matters require an affirmative vote of seven (and, now after the amendment of Art. 27, nine) members including the concurring votes of the permanent members. In the League all decisions of importance required unanimity as the nations were unwilling to surrender any portion of their sovereignty. The voting procedure in the United Nations is, therefore, a distinct improvement upon the League.

It is no doubt true that the veto right of the big powers may obstruct the activities of the Organization. The same was true also in the case of the League with the provision of unanimous decision. The veto right of the big powers prevents any enforcement action against them. It substantiates the doctrine that supreme power rested in the Security Council through the Big Five is above all law. It has, however, to bere no aboved that the decisions the of the Council of the League had merely the advisory or recommendatory character as the members of the League not represented on the Council were not obliged to carry out the decision of the Council.

There is a clear demarcation of functions between the Security Council and the General Assembly. The members of the United Nations have conferred on the Security Council the primary responsibility for the maintenance of international peace and security. There was no such clear-cut demarcation of functions between the Assembly and the Council of the League and as such the League was weak and lacked the characteristics of any world organization which could successfully maintain international peace and security. The Security Council, though having more restricted functions than the Council of the League, possesses more powerful means of enforcing its decisions.

With regard to enforcement measures there is a considerable difference between the League and the United Nations. The United Nations .can take enforcement actions even in case of threat to international peace; the League, on the other hand, was limited in its powers to take actions only when the member States had gone to war in breach of their covenants. The Security Council has been authorised to take actions even to the length of using armed

force or operations by air or sea and to call upon the members of the United Nations to make available to the Security Council on its call armed forces, assistance and facilities, including right of passage, for the purpose of maintaining international and peace and security. For this purpose the Security Council is assisted by a Military Staff Committee. There were no armed forces at the disposal of the League and even its decisions were mere recommendatory. Consequently a recalcitrant member could not be forced to carry out the decisions of the League.

There is a striking difference between the Charter of the United Nations and the Covenant of the League of Nations. The Covenant was characterised by a complete decentralisation of the procedure for the application of enforcement measures. Atricle 16 of the League left it to its members to decide whether another member had violated its obligations under the Covenant and whether enforcement measures not involving the use of armed force shall be applied. The Covenant did not impose upon the members any obligation for the use of armed force. It only authorised the Council to make recommendations. The Charter, on the other hand, has centralised both the decision as to the question whether there existed a threat to the peace, breach of the peace, or act of aggression and the decision as to the application of the enforcement measure whether involving or not involving the use of armed force, and has imposed upon the members the obligation to carry out this decision.

With regard to self-defence the League of Nations did not mention anything about the right of individual or collective self-defence. All that the Covenant provided was contained in Article 15, paragraph 7, which reads:

by the members thereof, other than the representatives of one or more of the parties to the dispute, the members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice."

Article 51 of the Charter is explicit on this point. It clearly defines the scope and extent of the right of self-defence and recognizes the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. It has, however, to be emphasised that the right of self-defence, individual or collective, arises only in case an armed attack occurs and not in case of military concentration on the border and continues till the Security Council has taken the measures necessary to maintain international peace and security. Such self-defence measures have to be reported to the Security Council immediately.

The Charter of the United Nations does not preclude the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that they are consistent with the purposes and principles of the United Nations. There was no such provision in the Covenant of the League of Nations beyond what was stated in Article 21 of the Covenant that nothing therein was deemed to affect the validity of international engagements such as treaties of arbitration or regional understanding like the Monroe doctrine for securing the maintenance of peace.

The Charter of the United Nations has placed emphasis on human rights and fundamental freedoms of mankind and on international economic and social cooperation with a view to the promotion of higher standards of living,

I. Hans Kelsen: The Law of the United Nations, p. 746.

full employment and conditions of economic and social progress and development, solutions of international economic, social, health and related problems and international cultural and educational cooperation, and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. The Covenant of the League of Nations did not make such provisions, it being concerned only with "the preservation of the territorial status quo of 1919."

The elaborate provisions for the establishment of a Military Staff Committee with a view to advising and assisting the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, did not find place in the Covenant of the League of Nations.

As regards the system of sanctions, as indicated earlier, the same was decentralised under the provisions of the Covenant of the League of Nations, inasmuch as each member of the League—and not the League Council—was bound and entitled to determine for itself whether a breach of the Covenant had occured. There was no obligation on the members with regard to military sanctions; Art. 16 of the Covenant merely recommended to the several Governments concerned what effective military, naval or air force the members of the League shall severally contribute to the armed forces to be used to protect the Covenants of the League. The Charter constitutes an improvement on the Covenant of the League of Nations as the decision to employ military forces rests with the Organization, which decision is binding on all members of the United Nations.

The League of Nations was essentially, as remarked by Goodrich and Hambro, European in its concern and operated under the influence of 19th century ideas including that of white man's special responsibility for less fortunate peoples. The United Nations is a far more representative body of the world and has established beyond doubt that it is impossible to impose colonialaism even if a strong country tried it on a weak country.

With regard to withdrawal from the two Organizations, the Covenant provided for voluntary withdrawal in case a member of the League voted against and refused to ratify an amendment. Members of U. N., however, do not cease to be members in case of their refusal to ratify an amendment to the Charter but are bound by such an amendment.

A few words about the Trusteeship Council may also be stated. Under the Covenant of the League there existed the mandate system, which was devised as a substitute for annexation of the territories which the Allies had conquered from Germany and Turkey during the First World War. The special organ of the system was a permanent commission, which consisted of experts appointed by the Council and were not representatives of the Governments. Under the Charter there is the trusteeship council composed of members administering trust territories, who are all permanent members of the Security Council and elected members of the General Assembly. Thus only members of the United Nations can be members of the Trusteeship Council. Further, the new system of trusteeship discards the rigid obligation imposed by the Covenant upon the administration of the mandated territories for the trust territories are now administered under agreements negotiated with the trustee states.

Viewed from any point of view the conclusion is irresistible that the U. N, is a distinct improvement upon the League of Nations.

The Council of the League and the Security Council.-At this stage

the Council of the League may also be compared with the Security Council. Although the Security Council, the pivot of the new organization, has more restricted functions than the Council of the League, yet it possesses more powerful means of enforcing its decisions than the old Council. The main responsibility for preserving peace in the world rests, as it should, on the shoulders of the Big Five, who are enjoined to act as Big Brothers. There is a clear demarcation of functions and powers between the Security Council and the General Assembly, where as no such demarcation existed between the Assembly and the Council of the League.

The old Council was a powerless body, with no army to enforce its decisions. The Security Council, however, will have land. air and naval forces at its disposal and the member states too are enjoined to render active assistance in times of emergency.

Measures promulgated for maintenance of international security are more adequate in the new Charter than in the old Covenant. Provisions have been made for mediation, arbitration and judicial settlement, failing which economic sanctions may be resorted to.

A serious handicap from which the League suffered was that the limits of self-defence were not clearly defined. In the new Charter, on the contrary, Article 51 clearly lays down that a member State may retaliate if and when there is an actual armed attack and then report the matter to the Security Council.

The League primarily confined itself to political activities. In the United Nations however emphasis is laid on the human personality, and the preservation of the fundamental rights of the individuals is a sacred duty of the United Nations.

The United Nations is a definite improvement upon the League of Nations and has the active support of big powers like the United States of America and the U. S. S. R., which the League did not have.

Limitations on the Functions of the United Nations.—The following are the various provisions in the Charter which place limitations on the United Nations:

1. Nothing contained in the present Charter authorises the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or requires the members to submit such matters to settlement under the Charter, but this principle does not prejudice the application of enforcement measures under Chapter VII. (Article 2, para. 7).

The difficulty, however, arises with regard to the determination of the question as to when international developments cease to be matters of domestic concern and become the concern of the whole world.

- 2. The Charter as a multilateral treaty is binding only on the parties thereto; but the rigidity of this principle is modified by the provisions of Art. 2 (6) which enjoins on the Organization to ensure that non-member States of the United Nations act in accordance with the principles of the Charter for the maintenance of international peace and security.
- 3. Nothing in the present Charter impairs the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibil-

ity of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. (Article 51).

- 4. Nothing in the present Charter shall invalidate or preclude action, in relation to any State which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorised as a result of that war by the Governments having responsibility for such action. (Article 107).
- 3. The Secretariat.—The secretariat generally follows the model of the League secretariat. The Charter attaches very great importance to the sceretariat for on the proper execution of the work entrusted to it depends to a large extent the smooth functioning of the Organization. The secretariat comprises a Secretary-General and such staff as the Organization may require. The Secretary-General is the chief administrative officer of the Organization and is appointed by the General Assembly upon the recommendation of the Security Council. The Secretary-General acts in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council and of the Trusteeship Council. He makes an annual report to the General Assembly on the work of the Organization. Besides all the functions, he is also authorised to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. Article 100 of the Charter provides that with a view to guaranteeing the international character of the secretariat, the Secretary-General and the staff in the performance of their duties shall not seek or receive instructions from any government or from any other authority external to the Organization. Article 97 of the Charter provides that the Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council, which must be made by an affirmative vote of seven (and, now after the amendment of Article 27, nine) members concurring votes of the permanent members of the Council.

The staff is appointed by the Secretary-General under regulations established by the General Assembly but the paramount consideration that governs the employment of the staff is the necessity of securing the highest standards of efficiency, competence and integrity.

The Secretary-General and all Assistant Secretaries-General enjoy full diplomatic immunities. The officials of the United Nations are immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. They are exempt from taxation on the salaries and emoluments paid to them by the United Nations.

4. The Trusteeship Council.—The trust territories under the Trusteeship Council have been fully discussed elsewhere in another chapter and need only a passing reference.

The United Nations has established under its authority an international trusteeship system for administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. The trusteeship system applies to the following territories, which may be placed thereunder by means of trusteeship agreements:

- (1) territories now held under mandate;
- (2) territories which may be detached from enemy States as a result of the Second World War; and
- (3) territories voluntarily placed under the system by States responsible for their administration.

The basic objectives of the trusteeship system are to further international peace and security, to promote the political, economic, social and educational advancement of the inhabitants of the trust territories and their progressive development towards self-government or independence, to encourage respect for human rights and for fundamental freedoms for all without any distinction as to race, sex, language or religion and to ensure equal treatment in social, economic and commercial matters for all members of the United Nations and their nationals.

The Trusteeship Council regularly meets twice a year to examine the annual reports submitted on the territories by the Administering Authorities and to carry out its other supervisory functions. The supervision and administration of trust territories are in the hands of the Trusteeship Council. The Trusteeship Council consists of those members administering trust territories, permanent members of the Security Council and those members of the United Nations which are elected by the General Assembly for a term of three years. The number of the elected members shall be equal to the number of the members of the Council administering trust territories minus the number of permanent members of the Security Council not administering trust territories.

Powers and Functions.—The powers and functions of the Trusteeship Council under the authority of the General Assembly are to consider reports submitted by the administering authority, accept petitions and examine them in consultation with the administering authority, provide for periodic visits to the respective trust territories and take those and other actions in conformity with the terms of the trusteeship agreements. Its function is also to formulate a questionnaire on the political, economic, social and educational advancement of the inhabitants of each trust territory and such questionnaires shall form the basis of the annual report to the General Assembly by the administering authority.

One of the Trusteeship Council's main functions is to examine the annual reports submitted by the administering authorities presenting a comprehensive picture of the political, economic, social, and educational progress in the trust territories.

After examining the administrative reports on the various territories, the Council has in the course of its various sessions made a series of recommendations to the administering authorities. In general, it has proposed that the people of each territory should take an increasing share in the political, economic and social life of the territory and, in speeding its development, has urged that educational facilities should be further expanded. Its more specific recommendations have included improved living standards and higher wages, more hospital and health services, better roads and industrial development, the abolition of corporal punishment and improvements in penal systems, greater participation of the indigenous inhabitants in economic and social spheres, and increased representation in local governments. In some cases, the Council has urged that more widespread measures be taken against racial discrimination, and has recommended increased technical and agricultural guidance.

Another clause in the Charter relating to provisions concerning trusteeship provides for the despatch of periodic visiting missions to the territories—a step forward since the days of the mandates system.

Petitions.—Another of the Trusteeship Council's important tasks is to examine petitions submitted by the people of the trust territories, and any

others which might concern the affairs of one or more of the territories, or the operation of the trusteeship system. By the end of its sixteenth session in 1955 the Council had considered about eight thousand petitions and communications from, or concerning, the trust territories. In addition, numerous petitions had also been received by the visiting missions while touring the territories.

The Question of South-West Africa.—In 1947, the South African Gove rnment informed the United Nations that it had decided not to proceed with the incorporation of South-West Africa into the Union, but would maintain the status quo and administer the territory in the spirit of the mandate. It undertook to submit reports on its administration for the information of the United Nations. The first of these reports was submitted to the second Assembly session, which referred it to the Trusteeship Council.

In 1949, the Council notified the General Assembly that the Union Government had decided not to submit any further reports on its administration of South-West Africa.

Court's opinion in 1950.—The Assembly in 1949 asked the International Court of Justice for an advisory opinion on South-West Africa. Handing down its advisory opinion on July 11, 1 50, the International Court unanimously found that South-West Africa is a territory under the international mandate assumed by the Union of South Africa on December 17, 1920. The Court further found that the Union continued to have international obligation under the League of Nations Covenant and mandate, including the obligation to transmit petitions from the territory, and that the provisions of Chapter XII of the Charter applied to it in the sense that they provided a means whereby the territory might be brought under the trusteeship system. However, the Court found that the Charter did not impose a legal obligation on the Union Government to place the territory under trusteeship. Nevertheless, it held that the Union, acting alone, was not competent to modify the territory's international status. Such competence rested with the Union acting with the consent of the United Nations.

The status of South-West Africa, placed under the Union's administration by a League of Nations mandate in 1920, has been an issue between the Union and the United Nations since dissolution of the League in 1946.

Case filed by Ethiopia and Liberia against South Africa for declaration re. mandate over South-West Africa.—On November 4, 1960, Ethiopia and Liberia asked the International Court of Justice to declare, among other things, that South Africa had modified the terms of the mandate over South-West Africa and that it had a duty forthwith to cease the practice of apartheid in South-West Africa.

South-West Africa is the only mandated territory which has not become independent or been put under a United Nations trusteeship.

South Africa raised preliminary objections to the hearing of the case, the first two objections being that the mandate treaty lapsed on the dissolution of the League of Nations and that Ethiopia and Liberia had no right to bring contended that the United Nation's founders, including South Africa not have a tacit understanding that the U. N. would supervise mandates, not converted into trustceships, that the United Nations did not consider itself an automatic successor in law to League functions and only took over League functions by special arrangement; and that there had been no special

arrangement that allowed the United Nations to take over supervision of mandates, not converted into trusteeships. In fact, after the dissolution of the League, the United Nations rejected South Africa's proposal to incorporate South-West Africa into South Africa and, in turn, South Africa refused to submit a trusteeship agreement.

The Court on December 21, 1962, rejected the objection from South Africa, ruling by 8 votes to 7 that it was competent to deal with the case. It also ruled that South Africa's mandate over 'South-West Africa—which South Africa claimed did not add up to a formal treaty arrangement—was in law an international undertaking with the character of a treaty or convention.

On the 18th July, 1966, the International Court of Justice by a single vote threw out the suit to end South Africa's control on neighbouring South-West Africa. The Court ruled by the casting vote of the President, Sir Percy Spender of Australia (the other 14 members of the Court voting 7:7), that the two suing powers, viz.. Ethiopia and Liberia, had established no legal right to bring the suit to break the old League of Nations mandate under which white-ruled South Africa administers the territory. By this decision, which is based on the technicality that neither Ethiopia nor Liberia had a legal right to complain to the Court about South Africa's administration for her League of Nations mandate over South-West Africa, a vast country with half a million population will be further kept in the colonial citadel of the racist South.

World Court's advisory opinion on the Status of South-West Africa.—The International Court of Justice in its advisory opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) ruled on June 21, 1971, that it considered South Africa's presence in South-West Africa to be illegal and that it should withdraw from the territory immediately.

Strategic Areas.—In the trustceship agreement there may be designated a strategic area or arreas forming part of the trust territory. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, are exercised by the Security Council. The Security Council may, without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the U. N. under the trusteeship system relating to political, economic, social and educational matters in the strategic areas.

Self Government for Trust Territories.—The admission of the new West African State of Ghana to the membership of the United Nations in March 1957, just after its emergence as an independent sovereign State on the midnight of March 5, 1957, marked a milestone for the International Trusteeship system under the United Nations. The first of the eleven trust territories placed under the Organization's supervision had reached the Charter's goal of self-government or independence. For British Togoland had attained independence as an integral part, along with the former British Colony of the Gold Goast, of the new State. Ten territories remained under the International Trusteeship system, and two of them, viz., French Togoland and Italian Somaliland, the United Nations trust territories in Africa, received the General Assembly's approval for their independence. The Assembly approved on the 5th December, 1959, to grant Togoland full independence on the 27th April, 1960, and Somaliland on July 1, 1960. Ruanda-Urundi, a trust territory administered by Belgium, became republic in January 1961.

The Belgian mandated territory of Ruanda-Urundi became independent on July 1, 1962, into two parts, viz., the Republic of Rwanda and the Kingdom of Burundi. On the 9th December, 1962, Tanganyika became an independent sovereign and democratic republic.

In accordance with their desire, the Cameroons secured their independence from the French rule, with the birth of a new nation in West Africa

on the 1st January, 1960.

By the middle of 1972, only two trust territories had remained, viz., the trust territory of the Pacific Islands (Micronesia) under United States administration, and Papua New Guinea under Australian administration. The trusteeship council from time to time reviews the developments in the

two remaining U. N. territories.

5. The Economic and Social Council.—The international peace and security depends not only upon the faithful compliance of obligations imposed by the U. N. but also upon the successful handling of international economic, social and other cognate matters. With this end in view the United Nations has established under the authority of the General Assembly the Economic and Social Council. This Council is composed of 27 (and before the amendment of Art. 61, 18) members of the United Nations elected by the General Assembly for three years. In December 1971 the U. N. General Assembly adopted a resolution to amend Art. 61 of the Charter so as to increase the number of members from 27 to 54. The amendment will come into force on its ratification.

Functions and Powers. -The Economic and Social Council is the main organ of the United Nations in the sphere of international economic and social co-operation. The functions of the Economic and Social Council are (1) to make or initiate studies and reports with respect to international economic, social, cultural, educational, health and related matters and to make recommendations with respect to any such matters to the General Assembly, to the members of the United Nations and to the specialised agencies concerned; (2) to make recommedations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all; (3) to prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence; and (4) to call international conferences on matters falling within its competence.

The Economic and Social Council is also entrusted with the task of coordinating the activities of the specialised agencies, through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the members of the United Nations. The Council may also take appropriate steps to obtain regular reports from the specialised agencies and may communicate its observations on these reports to the General Assembly. It has also to assist the Security Council upon its request. It has to set up commissions in economic and social field and for the promotion of There are regional economic commissions dealing with special problems in particular areas.

Regional and Security Arrangements.-The Covenant of the League of Nations did not affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace. The Charter of the United Nations makes similar provisions with regard to regional arrangements. Article 52 (1) provides:

"Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to 50

the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."

Regional arrangements are treaties having a regional character. term "regional agencies" denotes international agencies established by regional arrangement.

Article 52 clearly establishes the principle of regionalism "as opposed to

that of universality."

The Charter of the United Nations confers upon regional arrangements or agencies the function of achieving pacific settlement of local disputes before the dispute is referred to the Security Council. Regional arrangements or agencies may also act as an organ of the United Nations in the enforcement action, inasmuch as the Security Council has been authorised to utilize such regional arrangements or agencies for enforcement action under its authority, The Security Council has to be kept informed at all times of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

The North Atlantic Pact of 12 nations signed on April 4, 1949, by Belgium, Canada, Denmark, France, Iceland, Italy, Luxemburg, the Netherlands, Norway, Portugal, United Kingdom and U.S. A. at Washington for promoting stability and wll-being in North Atlantic area by forming an integrated West-European army, including Germany, has been claimed by America as a regional arrangement falling within Chapter VIII of the Charter of the United Nations and in no way different from the inter-American Security Arrangements of 1945. The U. S. S. R., on the other hand denounced the past and the content of the U. S. S. R., on the other hand, denounced the pact and stated that she could not tolerate resurgence of German army. She maintained that the pact was not a true regional arrangement inasmuch as it did not relate to true regional questions and comprised States located in two continents.

Close on the heels of the North Atlantic Pact is the Pacific Pact of 1951, the draft of which had been initialled by the United States of America, Austrlia and New Zeland. Under the pact the three nations have undertaken to come to each other's aid in case of an attack on any of them and to coordinate their collective defence efforts for the preservation of peace and security pending the development of a more comprehensive regional security system in the Pacific area.

The six-power Defence Community Pact was also signed in Paris on May 27, 1952, which brought into being the six-nation European army including 3,00,000 Germans. Britain, America and France gave formal pledge to support the six-nation army and guaranteed that any action against it would be regarded as a threat to their own security.

It will thus appear that the conclusion of regional defence pacts and alliances, e. g., the North Atlantic Treaty Organization (NATO), the Council of Europe, the Mediterranean Defence Organization (MEDO), .the South-East Asia Treaty Organization (SEATO) and the Pan-American Organization, on one side, or the Cominform and other Communist States alliances, on the other, and emergence of the Afro-Asian Bloc of neutral States in the international sphere as a third independent force constitute new developments in the field of international law.

The regional arrangements, observes Hans J. Morgenthau, which have been widely hailed as steps towards strengthening the United Nations, toward

realizing the intentions of the Charter, and toward enhancing peace and security are, in actuality, developments that "run counter to the function envisaged by the Charter in view of the anticipated continuing unity of the great powers. They are the very negation of these functions. For they stem from the realization that the unity of the great powers, upon which the operation of the United Nations was predicated, is unattainable under present world conditions."

Non-Self-Governing Territories.-Under Art. 73 of the Charter members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the Charter, the well being of the inhabitants of these territories, and to that end to ensure their political, economic, social and educational advancement, to develop self-government, to further international peace and security, to promote constructive measures of development and to transmit regularly to the Secretary-General for information purposes statistical and other informations of a technical nature relating to economic, social and educational conditions in the territories for which they are respectively responsible. Such information, after being summarized and analysed by the Secretariat, is studied by a committee appointed by the General Assembly. This committee, known as the Committee on Information from Non-Self-Governing Territories, may make specific recommendations to the General Assembly, designed to speed the progress of dependent peoples towards self-government and independence. The information received during 1947 was analyzed, summarized and classified by the Secretariat under the headings of labour, public health and agriculture.

On December 4, 1960, the General Assembly adopted a resolution embodying the Declaration in granting independence to colonial countries to the effect that all peoples have the right of self-determination; and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The General Assembly at the 21st session (1966) also adopted two Covenants, viz., the International Covenant of Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These Covenants envisage the right of self-determination for the non-self-governing and trust territories.

The voluntary transmission of information concerning political developments in the non-self-governing territories was the subject of a recommendation endorsed by the General Assembly in 1954. Under Article 73 (c) of Chapter XI of the Charter the administering states agreed to transmit regularly to the United Nations "statistical and other information of a technical nature relating to economic, social and educational conditions in the territories for which they are respectively responsible....." interpretation of this chapter has proved to be a controversial issue at several sessions of the General Assembly.

Towards Decolonization. 1—In the past 25 years, vast regions of the world, formerly under colonial rule, have evolved into independent States. The United Nations has been instrumental in this process, although the strongest stimulus for change has been the independence struggles by the rule. In the view of the Secretary-General,

<sup>1.</sup> Cf. The U. N. Publication, XXV Anniversary of the Organization.

"the existence of the United Nations is justified by its performance in facilitating the emergence of non-independent territories to independent statehood." With the admission of the new States to the Organization, the United Nations has become more representative of the peoples of the earth.

From its very inception, the United Nations has been engaged in promoting the self-government and improvement of the living standards of dependent peoples. The United Nations Charter includes provisions for dealing with dependent peoples as a whole and also for dealing specifically with those living in territories placed under the United Nations Trusteeship System.

Of the original 11 Trust Territories there remain only two—New Guinea and the Trust Territory of the Pacific Islands—which have not yet attained the Charter goal of self-government or independence. In addition to the supervision through the Trusteeship Council of the progress of the peoples of Trust Territories, the General Assembly has concerned itself from the very beginning with the future of all other dependent peoples, in what are known as Non-Self-Governing Territories.

Up to 1960, some 30 Trust and other Non-Self-Governing Territories had already attained self-government or independence. However, there was growing concern among United Nations Member States that the progress towards the complete emancipation of many countries under colonial status was too slow. Therefore, in 1960, the General Assembly adopted its historic Declaration on the Granting of Independence to Colonial Countries and Peoples, and the tenth anniversary of its adoption was celebrated in 1970.

The Declaration—often referred to as the Declaration on the ending of colonialism, or on decolonization—states:

"1. The subjection of peoples to alien subjugation, dominion and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

"2. All peoples have the right to self-determination: by virtue of that right they freely determine their political status and freely pursue

their economic, social and cultural development.

"3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretex for delaying independence.

"4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respe ted.

"5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

"6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations. "7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States and respect for the sovereign rights of all peoples and their territorial integrity."

To oversee the implementation of this Declaration, the General Assembly established a Special Committee in 1961. This body, now composed of 24 States, meets throughout the year, examining information on each dependent territory, studying petitions from the inhabitants, granting hearings to petitioners and making recommendations to the Assembly with regard to the independence of the territories. Since 1965, with the exception of 1968, it has made annual visits to Africa in order to be closer to the peoples with whose fate it is concerned. At present 45 territories, with about 28 million this Committee.

Of particular concern to the United Nations during recent years have been the situation in Southern Africa, including Sutheren Rhodesia, Namibia and the Portuguse Territories.

In November 1965, the Minority regime in Southern Rhodesia unilaterally declared its independence from the United Kingdom, despite warnings by the United Kingdom and the United Nations that such action would be illegal. Both the General Assembly and the Security Council subsequently condemned the Rhodesian authorities for their action. In November 1965 and April 1966 the Security Council initially passed two resolutions for voluntary sanctions of enforcement action. The latter empowered the British Government to take steps by the use of force if necessary to prevent ships taking oil to ports from which it could be supplied or distributed to a single U. N. member to use force which would otherwise be illegal. In selective mandatory economic sanctions against the "illegal racist regime" in the Territory. On 29th May, 1968, the Security Council unanimously mittee to oversee and report on these measures.

In January and June 1969, the Security Council's Sanctions Committee issued two reports which stated that the trade of the Territory remained quite substantial in 1968. Besides South Africa and Portugual, certain other countries continued to trade with Southern Rhodesia. However, all available evidence indicated that South Africa had become by far the main trading free flow of goods to and from the territory.

The Security Council met in June 1969 to consider the question of Southern Rhodesia, at the request of 59 African States which declared that the sanctions had failed to achieve the desired results, for various reasons, notably South Africa and Portugal. However the Council failed to adopt a and South Africa to the illegal regime, and would have extended sanctions to South Africa and the Portuguese colony of Mozambique. The draft economic and other relations with the illegal regime, including railway, maritime, air transport, postal, telephonic and wireless communications;

call on the United Kingdom to take all necessary measures, including the use of force, to bring the rebellion in Southern Rhodesia to an end.

Meeting on March 18, 1970, after the status of a republic had been assumed by the illegal regime in Southern Rhodesia, the Security Council condemned the illegal proclamation of such a status, and decided that Member States should refrain fron recognizing the illegal regime or giving any assistance to it. The Council also decided that Member States should immediately sever all diplomatic, consular, trade, military and other relations which they had with the illegal regime and "immediately interrupt any existing means of transportation to and from Southern Rhodosia."

Concerning South West Africa (now called Namibia), the General Assembly in 1966 terminated the mandate which South Africa had held over this Territory, and declared that South Africa had failed to ensure the moral and material well-being and security of the indigenous inhabitants. At a special session in 1967, the Assembly set up an 11-member Council to administer the Territory until it achieved independence. South Africa, however, has refused to recognize the Assembly decisions as valid and has continued to administer the Territory. Because of South Africa's refusal to co-operate in carrying out United Nations resolutions, the Council for Namibia has been unable to enter the Territory or discharge many of the functions entrusted to it.

On March 20, 1969, the Security Council called on South Africa to withdraw its administration from Namibia and decided that, if that did not occur, it would meet immediately to determine necessary steps or measures in accordance with the relevant provisions of the Charter. Meeting again in January 1970, the Council declared that the continued presence of the South African authorities in Namibia was illegal. It established a sub-committee to study, in consultation with the Secretary-General, ways and means by which the relevant resolutions of the Council relating to the Territory could be effectively implemented in accordance with the appropriate provisions of of the Charter, in the light of the flagrant refusal of South Africa to withdraw from Namibia. The sub-committee was requested to submit its recommendations by April 30, 1970.

With regard to the Territories under Portuguese administration, Portugal has failed to heed numerous United Nations resolutions calling for immediate action towards granting independence. The Security Council has called for an embargo on arms for use within the colonies, while the General Assembly has recommended that the Council make it obligatory for all States to sever diplomatic and economic relations with Portugal. The Assembly has urged also all States to withhold or desist from assistance that enabled Portugal to pursue its colonial war and condemned the collaboration of the regimes in Southern Africa. It also condemned Portugal's use of its territories to violate the territory and sovereignty of African States.

In 1969, the Assembly reaffirmed the legitimacy of the struggle of the colonial peoples to exercise their right to self-determination and independence and it noted with satisfaction the progress made in the colonial territories by the national liberation movements, both through their struggle and through reconstruction assistance to them. The Assembly called on Portugual to implement immediately its Declaration on the ending of colonialism and recommended that the Security Council take effective steps with a view to the immediate implementation of the Declaration.

The United Nations General Assembly have from time to time made declarations outlawing colonialism and racialism and asserting the right

of the develoging nations to close the chasm between their standard of living and that of rich nations.

On November 2, 1972, the U. N. General Assembly asked all countries to withhold aid to Portugal, South Africa and Rhodesia until they renounce their policy of colonial domination and racial discrimination. The Assembly, which adopted a resolution to that effect 199-5, with 23 abstentions, the United States, Portugal, South Africa, Britian and France voting against the resolution), called upon countries with non-self-governing territories to take all the necessary steps to enable the dependent peoples of the territories concerned to exercise fully and without further delay their inalienable right to self-determination and independence. It reaffirmed recognition of the legitimacy of the struggle of the colonial peoples and peoples under alien domination to enercise their right to self-determination and independence by all the necessary means at their disposal. The resolution was sponsored by 65 African, Asian, Carribean and Communist countries and drew the votes of nearly all those groups, plus Greece, Israel and others.

Implementation and Enforcement of Decisions of International Organization.1-In the United Nations, there are six principal organs and a large number of subsidiary organs, each of which may take decisions of one kind or another. The General Assembly has so far adopted more than two thousand four hundred resolutions. The number of decisions in each resolution may vary from one to over 40. Similary, the Security Council, ECOSOC and Trusteeship Council each have adopted a large number of resolutions within their field of compet ne :.

Implementation and enforcement are two distinct terms. Implementa tion' signifies persuation short of compulsion. 'Enforcement' means action tocompel compliance or sanctions. It may generally be said that when a decision is taken by an international organization there is an expectation that it will be implemented. Some decisions may require no implementing action at all. Others, e. g., admission of new members, are implemented more or less auto-

The Secretariat of the United Nations is responsible for implementation of the U. N. decisions. When a session is over, or even during the session if the matter is urgent, the Secretariat office or department involved goes through the decisions of the organs as embodied either in resolutions, reports or other records and notes each action which the Secretariat must take and makes appropriate assignments of responsibility to divisions or individual officers. Recourse is sometimes had of the Legal Office for an opinion when questions of interpretation, competence or other matters arise. Many actions are routine. Letters are written, studies and consultations are undertaken, reports are preparmade for convening are planned and operations carried out. Other decisions may entail a series of emergency actions. For example, in 1956, when the General Assembly took the decision to establish the U. N. Emergency Force, the Secretary-General had to arrange with the participating states for the necessary contingents, negotiate with the states on whose territory the Force was to operate and the States whose forces the UNEF was to replace, and tackle the problems of transportation, logistics, communications, organization and administration. In 1960, when the Security Council decided to send a U. N. Force to the Congo, the Secretary-General was faced with even more complicated constitutional, legal and policy

Implementation also includes international action to encourage and 1. Proceedings of the American Society of International Law, 62nd Annual Meeting (April 1968) : Blaine Sloan, Director-General. Legal Division, United Nations Secretariat.

persuade states to become parties and to comply with the obligations which they undertake. The United Nations does not have a highly developed technique for implementation of "international legislation". Only Art. 64 of the Charter furnishes a basis for such procedure in the economic and social field, providing that the ECOSOC may make arrangements with the member states to obtain reports on steps taken to give effect to its recommendations.

Some resolution are perennials. For example, the resolution providing for the repatriation and compensation of the Palestinian refugees is recalled every year by the Assembly. Resolutions on racial policies of South Africa having been adopted by the General Assembly and the Security Council are also recalled each year. A large number of resolutions relate to the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

Procedures for seeking implementation have included repeated calls of the state itself, the establishment of a committee for implementing the decision, the appointment of a representative to negotiate and report, and calling on other states to use their influence with the state concerned to obtain implementation.

The enforcement actions that the U. N. can take are found in Chapter VII of of the Charter. Article 39 provides that the Security Council shall determine the existence of any threat to peace, breach of peace or act of aggression, and shall make recommendations or decide what measures shall be taken to maintain or restore international peace and security. Under Art. 40 the Security Council may call for provisional measures by the parties. Article 42 provides that the Security Council may take such action by air, sea or land forces, including demonstrations, blockades and other operations, as may be necessary to maintain or restore international peace or security.

Some forms of assistance or benefits have been withheld from member states because of their non-compliance with decisions of the General Assembly or the Security Council. Portugal and South Africa, for example, are not eligible for assistance from the United Nations Development Programme. They have also been barred from participation in the Economic Commission for Africa. Under Article 5 the rights and privileges of a member may be suspended where preventive or enforcement action has been taken by the Security Council against him. Under Article 6 a member may be expelled from the Organization on persistent violation of the principles contained in the Charter. This action has never been resorted to, however, as it has seemed preferable that the offending state should continue to remain a member. Then there is the deprivation of the right to vote in the General Assembly under Art. 19 where the member is in arrears in the payment of its financial contributions to the Organization. Further Article, 102 prohibits the invoking of a non-registered treaty or agreement before any organ of the United Nations.

Revision of the Charter.—Article 108 of the Charter permits the amendment of the Charter by a vote of the two-thirds of the members of the General Assembly and ratified by two-thirds of the members of the United Nations, including all the permanent members of the Security Council. Article 109 also provides that a general conference of the members of the United Nations for reviewing the Charter may be held at any time by an affirmative vote of two-thirds of the members of the General Assembly and by a vote of any seven members of the Security Council and that if such a conference has not been held before the 10th annual session of the General Assembly the proposal to call such a conference shall be placed on the agenda of that session, and the conference shall be held if so decided by a majority vote of the mem-

bers of the General Assembly and by a vote of any seven members of the Security Council.

On the 17th December, 1963, the United Nations General Assembly adopted, in accordance with Art. 108 of the Charter, by an overwhelming majority of 97 to 11 a resolution for amendment of the United Nations Charter so as to expand the membership of the Security Council from the present 11 to 15 and another resolution to expand the membership of the Economic and Social Council (ECOSOC) from 18 to 27. The draft resolution proposed an increase in the strength of the non-permanent members of the Security Council from six to 10 and also provided for a majority of nine to pass a resolution in the Security Council instead of seven.

The second change in the Charter was consequential on the earlier amendments, and Art. 109 (1) was amended by the General Assembly resolution of December 20, 1965, which entered into force on June 12, 1968, so as to increase from seven to nine the number of votes required for the concurrence by the Security Council in the convening of a general conference for the purpose of reviewing the Charter.

On December 20, 1971, the U. N. General Assembly, adopted yet another resolution to amend Art. 61 of the Charter so as to increase the number of members of the Economic and Social Council from 27 to 54. The amendment will enter into force on its ratification in accordance with their respective constitutional processes by two-thirds of the members, including all the permanent members of the Security Council as a constitutional processes.

In any general revision of the pre-atomic Charter the factors which would necessitate consideration for revision are with regard to (1) the veto power of the Big Five enshrined in Art. 27 (3) of the Charter which has obstructed the operations of the Security Council; 2) Matters falling within the domestic jurisdiction of a State under paragraph 7 of Art. 2 so as to embody a clause that this principle shall not prejudice the application of preventive or enforcement action under Chap. VII and matters which are the subject of intenational obligations including the observance of, and respect for, human rights and fundamental freedoms; (3 Membership clause under Art. 4, so as to provide that membership in the United Nations may be open to any State willing to undertake the obligation of such membership without the inter vention of Big Power pressures; (4) Compulsory jurisdiction of the International Court of Justice to hear appeals from judgments of municipal courts adjudicating upon maritime captures during war; (5) Participation of a non-member State in the discussion of the Security Council, without vote, as provided in Art. 32 of the Charter, even in the Security Council's investigation of a situation which might be of vital interest to such non-member; (6) Fixing of definite time limit for the granting of independence to each non-self-governing territory under Art. 76 (b), and to place the former mandated territories compulsorily under the trusteeship under Art. 77 (a) and colonial possessions under Art. 76 (c) of the Charter; (7) Abolition of the distinction between ordinary and strategic trust territories and both to be administered under the supervision of the General Assembly by amending Arts. 83 and 85 (1) of the Charter; (8) Suitable provision so as to ban mighty concourse of colonial powers in the name of regional security envisaged under Art. 52 of the Charter; (9) Clear declaration of the powers which the member States might be willing to grant to the United Nations with a view to removing the vagueness in different provisions of the Charter; (10) Definition of procedural matters by inserting an interpretation clause in Art. 27 of the Charter; (11) Admission of Taiwan-a viable nation

of 15 million people-which was expelled after over 25 years of active and often constructive membership in the world body on the admission of Peking China, North Vietnam, North Korea, East Germany and all other political units exercising sovereign powers and recognised diplomatically by some members of the United Nations; (12) Weighted voting—In order to improve the representative character of the General Assembly there might be introduced some system of weighted voting so that smaller nations like Iceland or Island of Fiji with smaller world responsibility might not carry the same voting rights there as China or India; and, lastly, (13) Increasing the number of permanent seats on the Security Council to six and allotting one to India which is now the leading democratic power in Asia.

Review of the activities of the U. N. during the past years.—The United Nations has lived through more than one full decade of the atomic age. In this period the United Nations has had an impact on millions of lives. It has proved to be the only existing machinery that could help in bringing about peace in the world. It has not toppled down under the storm and stress of hectic activities of these years round the Berlin issue, Tehran issue, Greek solution, situation in Jerusalem, situation in Kashmir and lastly in Korea. It arrested five wars—on the borders of Greece, in Kashmir, in Palestine, in Indonesia and in Egypt. It brought back peace in Korea. It removed foreign troops from Syria, Lebanon, Burma and Iran, and it helped break the deadlock of the Berlin blockade.

It is within the United Nations that the first steps were taken to convert atomic energy for war to atomic energy for peace. It called an Atoms for Peace Conference in Geneva in August, 1955, which was represented by 72 nations. Hopes were held out at this Conference that the enormous power of the H-Bomb will be harnessed within the next two decades to solve for ever man's demands for power and energy.

In its first 10 years 600 million people gained political independence. The role it has played in leading colonial territories to independence would justify its existence even if it had failed in its other principal endeavours.

The United Nations, which counted 51 members at its inception, has expanded, and the total number of its members at the end of December 1972 was 132. That itself is a glowing testimony to its effectiveness.

Korea was a crucial test for the United Nations. As the result of a proposal first made by the Indian delegate V. K. Krishna Menon, in November, 1952, a truce plan for Korea was eventually worked out and peace returned to the war-torn Korean peninsula.

In the case of Indonesia, a U. N. Commission brought an end to a war in which Indonesia sought its independence from the Netherlands. Indonesia, after achieving its independence, became a member of the United Nations or September 28, 1950.

In the dispute over Kashmir, a U. N. Commission halted open warfare between India and Pakistan. Although a final settlement has not been concluded, U. N. military observers continue to patrol the border and U. N. mediators are still at work. Again, in September 1965 the Security Council was successful in bringing about termination of the 22-day war between India and Pakistan.

The United Nations has also concentrated its attention to bring about disarmament.

All organizations around the U. N. O., like the International Labour

Organization, the International Court of Justice, the International Monetary Fund, the World Health Organization and the United Nations Educational, Scientific and Cultural Organization are a great success and redound to its eredit. The United Nations plays a key role in the co-operative efforts to tackle long-term social and economir problems; but in the political sphere the Organization's place is uncertain.

The United Nations born of the Charter has done well, but it has not done well enough. In a sense, it is a great parliament of mankind to which evils, injustice and the aspirations of man are being brought; it has helped to prevent local conflicts from turning into world-wide conflagrations; it has assisted 1,000 million people to gain their independence; it has proclaimed the inalienable rights of the human person; it has revealed and helped to heal the great economic social inequalities that prevail on Earth; it has condemned and fought colonialism, discrimination and racism in all its forms; it has defended the dignity of man and the integrity of our environment; and it has looked far into the future, warning nations and men of world-wide dangers ahead. But the United Nations has not done well enough. It is unforgivable that so many problems from the past are still with us, absorbing vast energies and resources desperately needed for nobler purposes: a horrid and futile armaments race instead of world development : remnants of colonialism, racism and violations of human rights instead of freedom and brotherhood; dreams of power and domination instead of fraternal co-existence; exclusion of great human communities from world co-operation instead of unversality; extension of ideological domains instead of mutual enrichment in the art of governing men to make the world safe for diversity; local conflicts instead of neighbourly co-operations. 1

Despite its obvious shortcomings and desptte the current popular tendency in some parts of the world to downgrade the United Nations, the Secretary-General, Kurt Waldheim, observed in his Introduction to the Report on the Work of the Organization covering the period June 1971 to June 1972 that the Organization still remains the best long-term basis on which the international community as a whole can opt for survival, justice and progress with the participation of all nations. In the long run there is no substitute for such an instrumentality.

Several agreements contributing in some way or the other to the cause of world peace came about in 1971-72. Among them were the Antarctic Treaty, Treaty banning Nuclear Weapon Tests in the Atmosphere, Outer Space and Underwater, Treaty of Tlatelolco, and the Nuclear Non-proliferation Treaty. There was also a convention outlawing biological weapons. In the new State of Bangladesh, the United Nations, through the largest relief programme in its history, has played an important role in helping the war-ravaged country. The U. N. responded to the appeal of the Sudan government for help in the resettlement and rehabilitation of the southern region of the country. Within the United Nations itself, the representation of the People's Republic of China, has been a major event and it was a positive step towards universality within the United Nations.

In other areas two significant events occurred during this period—the third session of the U. N. Conference on Trade and Development held in Santiago, and the U. N. Conference on Human Environment, held in Stockholm in June 1972. The Stockholm Conference, in particular, was a pioneering effort for world community. The new task formulated therein for the

<sup>1.</sup> Secretary-General U. Thant's Message on the United Nations Day October 24, 1370.

United Nations and the new machinery being proposed to be added to the General Assembly for performing it offers a new challenge and a new opportunity to the United Nations.

In order that the United Nations may not meet the fate of the League of Nations, it is high time for the leaders of the world to turn radically away from the errors of the past and to realise that understanding, love and tolerance are the highest forms of interest on our small and inter-dependent planet. And, as the Secretary General observed: We have reached the Moon but we have not yet reached each other. We have to resuscitate the United Nations by eliminating big power rivalry. The United Nations, this hesitant, almost reluctant instrument of nations for world peace and unity, can only succeed if its constituent members support it, love it, give it their best and want it to succeed. It will fail if Governments scoff at it and continue to tread their isolated, divisive and selfish paths. There is at present a dangerous trend to solve problems outside the United Nations. The international body failed to discharge its primary function of maintaining peace in the Indian sub-continent in the year 1971. Even though the barbarities committed in East Pakistan by military rulers of West Pakistan were unparalleled, the conscience of the United Nations could not be stirred. It then failed to prevent the outbreak of war between India and Pakistan and to put an end to it once it had broken out. Its record in the Vietnam War was not encouraging. The United Nations was not only deliberately by passed during that war but also even at the Faris conference. North Vietnam's misgivings, about international initiatives were born of this failure of the U. N. in the past to alleviate Vietnam's sufferings. The need of the hour is for multi-lateralism, and world peace can be achieved through international co-operation, and the best way is through the United Nations. The United Nations should also not be dominated by big and powerful nations at the cost of the interest of the smaller and weaker nations.

The U. N. Charter is a testament of human faith in the future of mankind, and so long as that faith endures, civilisation must continue to grow and evolve.

### CHAPTER XXXIII

#### SURVEY OF SECURITY COUNCIL AT WORK

The Security Council is one of the main organs of the United Nations. It consists of fifteen members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, Great Britain and the United States of America are five permanent members, while ten non-permanent members are elected by the General Assembly for a term of two years.

The performance of almost all legally important functions of the United Nations is conferred upon the Security Council acting either exclusively or in consultation with the General Assembly. The primary responsibility for the maintenance of international peace and security has been conferred by the members of the United Nations on the Security Council. It has more or less to perform the work of an executive nature. It acts on behalf of the United Nations and under Art. 25 of the Charter the members of the United Nations have undertaken to accept and carry out the decisions of the Security Council.

The Security Council, as said in an earlier chapter, performs dual functions. It investigates disputes and takes action with respect to breaches of the peace. It determines the existence of any threat to the peace or act of aggression and makes recommendations or decides measures that shall be taken to maintain or restore international peace and security.

405

It is proposed here to discuss some of the most important disputes or situations that have been brought before the Security Council upto this time.

- 1. Indonesia.—During World War II the Japanese had driven the Dutch out of the East Indies. The nationalists of Indonesia which had formerly been under Netherlands' control set up a Republic of Indonesia just after the surrender of the Japanese forces in Indonesia, and on their return the Dutch found a strong nationalist movement in the Islands. They declared their independence. Hostilities ensued between the Netherlands and the Indonesian Republic. In July 1947 Australia and India brought the situation to the notice of the Security Council which offered its good offices in settling the dispute. It appointed a Good Offices Committee which brought a cease-fire in August 1947. The Netherlands and the Republic signed a truce agreement on January 17, 1948, on board the U.S.S. Renville. Later the truce broke down at the instance of the Netherlands. The Security Council asked the parties to cease hostilities but no heed was paid by the Netherlands Government. On the report of the Good Offices Committee the Security Council on January 28, 1949, called upon the Netherlands Government to cease military operations and to release immediately all political prisoners arrested by them and recommended the formation of a federal, independent and sovereign United States of Indonesia and the transferring of sovereignty over Indonesia by the Government of the Netherlands to the United States of Indonesia at the earliest pessible date and in any case not later than July 1, 1950. A conference was held at The Hague later that year with representatives of all the parties. With constant encouragement from the United Nations the Netherlands Government recognised the Republic as an independent sovereign State. At the next session of the General Assembly in 1950 Indonesia was admitted as the sixtieth member of the United Nations.
- 2. Greece.—The end of World War II left Greece in a badly devastated condition. Its army had been shattered and there was a constant incursion of communist guerillas supported by the Communist States of Albania, Yugoslavia and Bulgaria. At the instance of the Greek Government, British troops helped Greece in her defence. The U.S.S.R. complained to the Security Council on January 21, 1946, that the continued presence of British troops in Greece constituted interference in Greek internal affairs which was likely to endanger peace and security. On Greece's denying any such interference, the matter was not taken cognisance of by the Security Council. Thereupon Greece protested that the communist States were aiding the guerillas. A special investigation commission was appointed by the Security Council to examine the situation. The Commission gave a majority report on May 27, 1947, that the three northern States, viz., Yugoslavia and to a lesser degree Albania and Bulgaria, had supported guerilla warfare in Greece.

Subsequently the task of financially helping Greece was taken over by the United States, which explained her action to the Security Council. It was stipulated that the action should be stopped if the United Nations decided at any time that it was no longer necessary. The U.S.S. R. criticised it as unilateral action and said that such aid should be given through the United Nations.

The Greek question was taken up by the Assembly in September 1947. It recommended that Greece and her three neighbours settle their disputes through the establishment of normal diplomatic relations and called on Albania, Bulgaria and Yugoslavia to do nothing to aid the Greek guerillas.

A United Nations Special Committee on the Balkans was appointed for the purpose but it failed to implement the Assembly's recommendations.

The situation, however, subsequently improved. Yugosla ia ceased to give aid to guerillas in Greece. The Greek army had also gained momentum and was able to restore order. The problem which, however, defined solution was one of the repatriation of some twenty-five thousand Greek children who had been taken north of the border in 1948. On the recommendation of the Assembly for the return of the children who wanted to be sent back, Yugoslovia co-operated but other East European States adopted an unhelpful attitude.

- 3. The Berlin Blockade.—On September 29, 1948, France, the United States, and the United Kingdom drew attention of the Security Council to serious situation which had arisen as the result of the unilateral imposition by the Government of U. S. S. R. of restrictions on transport and communications between the Western Zones of occupation in Germany and Berlin, an action which they said amounted to a blockade against the sectors in Berlin occupied by the United States, United Kingdom and France and was contrary to the obligations under Art. 2 of the Charter and caused a threat to the peace. The U. S. S. R. questioned the Council's competence, contended that the measures taken by the U.S.S.R. had been necessitated by currency reforms in the Western Zones which threatened the Soviet Zone with economic collapse; and the separation of the Berlin question from the entire problem of Germany was artificial and would lead to erroneous decisions. On the other hand, the United States contended that the question before the Security Council was not the entire problem of Germany, but the threat to international peace end security caused by the imposition of the Soviet blockade of Berlin. The question was ultimately placed on the Council's agenda. The United Nations representatives of the four occupying powers held informal conversations on the Berlin question and arrived at an agreement in May 1949 whereby all restrictions imposed since March 1, 1948, by the Government of the Union of Soviet Socialist Republics on communications, transportation and trade between Berlin and the Western Zones of Germany and between the Eastern and Western Zones were removed on May 12, 1949. All the restrictions imposed since May 1, 1948, by the Governments of France, the United Kingdom, and the United States on communication, transportation and trade between Berlin and the Eastern Zone and between the Western and Eastern Zones of Germany were also removed on May 12, 1949.
- 4. Palestine.—On a motion of the United Kingdom on April 2, 1947, the question of Palestine was placed on the Assembly agenda. A special session was convoked during April and May 1947 and on May 15, 1947, it established the United Nations Special Committee on Palestine mittee issued a report on August 31, 1947, recommending that Palestine should be divided into an Arab State, a Jewish State, and a special area including Jerusalem under an international government. The plan was accepted by the Assembly, with the result that it was provided that the British mandate over Palestine was to terminate and the British armed forces were to be withdrawn by August 1, 1948. The General Assembly set up the U. N. Palestine Commission to carry out the plan. The Commission reported steady deterioration of conditions in Palestine and opined that there would be administrative chaos, starvation and strife throughout Palestine after the British had left. A special session of the Assembly was called which requested the Trusteeship Council to devise a plan for establishing order in Jerusalem. The Council succeeded in obtaining an agreement

from the representatives of Arabs and Jews for a cease-fire in the City, to be followed by a truce. A Truce Commission was set up but the situation did not improve. The British gave up their mandate on May 15. Soon the Arab States instituted armed action in Palestine. The Council called on all governments and authorities to abstain from any hostile military action in Palestine. The General Assembly on May 14, 1948, adopted a resolution which provided for the appointment of a United Nations mediator to seek an end to the conflict. On May 20, Count Folke Bernadotte, President of the Swedish Red Cross, was appointed as the mediator. A four-week truce was arranged by the Mediator on June 11. At the end of the four weeks the Arab States refused to extend the truce and hostilities broke out anew. Council meeting in emergency session on August 19 warned that both Arab and Jewish authorities would be responsible for any violations of the truce. On September 17, the Mediator, Count Bernadotte, and the chief of the French observers, Colonel Andre Serot, were shot and killed in the Israel sector of Jerusalem. After incessant fighting mediation efforts proved successful and the Governments of Egypt and Israel signed a general armistice agreement at Rhodes on February 24, 1949; Lebanon and Israel at Ras en Naqoura on March 23; Jordan and Israel at Rhodes on April 3; and Syria and Israel at Manhanayim on July 20.

- 5. Syria and Lebanon.—On February 4, 1946, Lebanon and Syria brought to the attention of the Security Council the continued presence there of British and French troops. A resolution was proposed in the Security Council expressing confidence that the foreign troops would be withdrawn as soon as practicable, but it was blocked by a Soviet veto. The withdrawal of French and British troops from Syria was, however, completed in about two months.
- 6. Anglo-Iranian Oil Dispute.—In the Anglo-Iranian dispute over the nationalisation of Iran's oil industry in May 1951, the International Court of Justice, on the application of Britain for provisional steps, upheld the British Government's plea for a 'freeze' in the Iranian oil dispute. Iran rejected the ruling of the World Court. The dispute was referred to the Security Council which adjourned its discussion on the 19th October, 1951, until the Court had ruled whether it was within the Court's jurisdiction. The Court finally on July 22, 1952, ruled that is was not competent to deal with the Anglo-Persian oil dispute and rejected Britain's claim that it was competent to deal with her complaint against Persia's nationalisation of the British owned oil industry.
- 7. The Corfu Channel Dispute.—In October 1946 two British warships were seriously damaged by striking mines in Albanian territorial waters. Great Britain raised the matter in the Security Council alleging that Albania was responsible for the presence of the mines in the Channel. The case came before the International Court of Justice which decided that Albania was responsible for the explosions and that on the occasion when the explosions occurred the British had not been trespassing in Albanian waters. But it ruled that the British had violated Albanian waters in the following month and that the declaration of the Court's judgment was all the compensation for that violation warranted in the circumstances.
  - 8. Legal Issues involved in Korean War .- At the end of the Second

World War the Soviet and American forces took over the territory of Korea from the Japanese and a division was made along the line of 38th parallel of latitude. Due to difference between the U.S.S.R. and U.S.A. over consultation with Korean parties, the United States laid the whole Korean question before the U. N. General Assembly in September 1947. The Assembly set up a Temporary Commission to supervise the election of representatives in that country. However due to an unprovoked attack by the North Koreans on the South Korean Republic, the Security Council adopted a resolution on 25th June calling for immediate cessation of hostilities and withdrawal of troops. On this not being complied with the Security Council further adopted a United States draft resolution on the 27th June, 1950, noting that the authorities in North Korea had neither ceased hostilities nor withdrawn their armed forces and recommending that members furnish such assistance to the Republic of Korea as might be necessary to repel the armed attack and restore international peace and security in the area. On the same date the United States announced that its air and sea force had been ordered to give cover and support to the troops of the Korean Government. On the 7th July, 1950, the Security Council yet adopted another resolution which recommended that all members providing military forces and other assistance pursuant to the aforesaid Security Council resolution make such forces and other assistance available to a unified command under the United Nations.

The main issues of International Law involved in this connection were; (1) Whether the North Korean armed attack directed against South Korea constituted an act of aggression and breach of the peace; and (2) Whether the action taken in Korea by the Security Council was legal and imposed any obligations on the non-contesting members.

As regards the first question the Security Council in accordance with Art. 39 of the Charter determined that the North Koreans had made an armed attack against the South Koreans which constituted a breach of the peace. The fact that either or both were not members of the United Nations or had not attained the status of a State would not materially affect the question, for the Security Council may decide that a situation not having the character of a conflict between States might still be a threat to international peace and take enforcement action against a group of people involved in the situation. Accordingly North Korea was declared to be an aggressor by the United Nations and thus responsible for the breach of the peace.

As regards the second issue, it might be stated that powers available to the Security Council after making a determination under Art. 39 are contained in Arts. 40, 41 and 42. The Security Conneil's action on June 27 was merely recommendatory. According to Julius Stone, "none of the Security Council's resolutions of June 25, 27, or July 7, 1950, appear by their terms to be such 'decisions' for enforcement action as impose obligations on members under the Charter to carry them out or even to afford mutual assistance."

Further, the three resolutions of the Security Council were adopted in the absence of one of the permanent members of the Security Council. Under Art. 27 (3) decisions of the Security Council on all matters other than procedural were made by an affirmative vote of seven [and, now after the amenament, nine] members including the concurring votes of the permanent

members. The Soviet Union, therefore, challenged the legality of the resolutions at the 482nd meeting of the Security Council on the ground that the decisions of the Council could be lawful only if its five permanent members participated and concurred in the same. And since the representative of U. S. S. R. was absent and the Chinese People's Republic was not represented, the resolutions adopted by the Security Council under the dictate of the United States delegation and in breach of the United Nations Charter had no legal force. This contention, though negatived, seems to have some force, especially as regards the absence of the Soviet Union. This view is also shared by Professor Julius Stone who observes that "even however if the terms of Security Council action had been in terms of 'decisions', the Korean action cannot qualify as a matter of technical law, as an enforcement action in accordance with the Charter in which members were obliged to join, because of non-conformity to the voting rules, especially as to the concurrent vote of permanent members." He observes further that "in so far as concerns any obligations of members to make available 'armed forces, assistance....... facilities, rights of passage, or air force contingents under Arts. 43 and 45, these could in any case not arise as at the time when the Korean resolutions were adopted. For these obligations are subject to special agreement between each member and the Security Council; and since no such agreements then existed, even decisions conforming to the voting rules would not have imposed them on members."

Professor Julius Stone, therefore, considers the Security Council's recommendations in the resolutions of June 27 and July 7 as a collective expression of the individual wills of the members, rather than a collective 'decision' imposing Charter obligations on members, and they imposed nos enforcement obligations on the members whether under Art. 2, para. 5 or otherwise.

Professor Gross is of the view that individual members could voluntarily have achieved, either individually or by action through the General Assembly, results as good as those for which the Security Council tortured the voting rules into a legal morass, although he is of opinion that since such voluntary action depended upon the will of the individual members of the United Nations, it constituted 'action' of the United Nations, in which members assisted by virtue of obligations under Art. 2, para. 5.

Professor Kelsen is of the view that since the Charter does not define the concept of action of (or by) the United Nations, it is not excluded to consider an action performed by a member in conformity with a recommendation of an organ of the United Nations, especially an action performed in conformity with a recommendation made by the Security Council under Art. 39, as an action of (or by) the United Nations.

In this conflicting state of views the matter remains in doubt, and for an authoritative opinion it is desirable that it be referred to the International Court of Justice for its opinion. Apparently the view of Professor Julius Stone seems to have much force that the Security Council's recommendations in the resolutions of June 27 and July 7 were a collective expression of the individual wills of the members which imposed no enforcement obligations on the members whether under Art. 2, para. 5 or otherwise.

Whatever may be the authoritative decision in the matter, if the subsequent practice as establishing the understanding of the parties regarding the interpretation of Art. 27, para. 3, of the Charter were to be an index, the conduct of the Security Council, which was acquiesed in by the General Assembly, and in particular the conduct of the permanent members of the

Security Council showed that like an obligatory abstention (where a permanent member is a party to a dispute), a voluntary abstention by a permanent member is not tantamount to a veto.

9. The Question of Algeria.—On January 5, 1955, Saudi Arabia brought to the attention of the Security Council the grave situation in Algeria. The various factors that contributed to the complexity of the issue were: (i) the question of the settlers who had settled on the Algerian soil and wished to hold fast to it; (ii) the natives having gained ascendancy were constantly demanding freedom; and (iii) French economy could not afford to lose Algeria.

On the Algerian issue being raised in the United Nations, France declared that she did not and would never accept United Nations authority with regard to French policy in Algeria. She claimed Algeria to be part of France, which fact, her delegate observed, had never been questioned by international bodies, and the North Atlantic Treaty, for instance, expressly mentioned the French departments of Algeria. Britain and the United States backed France in February 1957 in her opposition to a United Nations 'interference' in Algerian affairs.

An 18-power Asian-African resolution was moved in the U. N. Political Committee in February 1957 calling on France to respond to the Algerian people's right to self-determination. The Committee however rejected the Afro-Asian move but approved the Philippine-Thailand-Japan resolution expressing the hope that France and Algerian people would try to end the bloodshed in Algeria through negotiations.

The prolonged and desperate fight for independence by Algerian nationalists ended secessfully on March 18, 1962, when the French and Algerian negotiators concluded a cease-fire agreement marking the end of the sevenyear-old war in Algeria.

On the 16th September, 1959, President de Gaulle undertook to grant the Algerian people a free choice between seccession, complete integration with France and internal self-government in close association with France, within four years of the restoration of peace.

As a result of the Algerian referendum results which were in favour of independence in co-operation with France, Algeria became independent on the 3rd July, 1962, and the Provisional Government of Algeria took over the administration from the French High Commissioner. The French Government also published a declaration in Paris recognising the independence of Algeria.

10. Kashmir.—In the Kashmir tangle there was mass invasion of tribal people, aided and abetted by Pakistan over the territory of Kashmir. The Maharaja of Kashmir appealed to the Indian Government for military aid. India had no jurisdiction to intervene in the internal affairs of the Kashmir State without its accession to India. To overcome this difficulty the Maharaja of Kashmir acceded the State to India, and the Indian Prime Minister accepted the accession subject to a plebiscite of the people of Kashmir to be held after the restoration of normal conditions. India complain ed to the Security Council on January 1, 1948, that the invaders were allowed transit across Pakistan territory and to use Pakistan territory asa base of their operations. The Security Council appointed a Commissionto investigate and mediate between the contending States. It brought about a

411

cease-fire; but the Security Council could not succeed in paving the way for a plebiscite under the auspices of the Commission. The legal position of the State of Jammu and Kashmir is that it forms part of the Indian territory having delegated to India its three subjects, viz., defence, communications and foreign affairs. The Pakistan Government committed an act of aggression against the Indian Union by actively assisting the tribal raiders. The accession of Kashmir to India was completed finally and the question settled by the people of Kashmir when the Kashmir Constituent Assembly decided to ratify the accession of Kashmir to India.

- 11. The Suez Canal. —Another question which engaged the attention of the Security Council was that of the Suez Canal on account of a proclamation of nationalisation by Col. Nasser. The fundamental issue was whether there could be any national control over the canal. Egypt promised to pay full compensation to the shareholders of the French company managing the canal in which the controlling interest was held by the British Government. A compensation agreement between the shareholders of the Suez Canal Company and the United Arab Republic was signed at Geneva in 1958.
- 12. Hungary. 2—On November 4, 1956, the United States submitted a resolution to the Security Council calling on the Soviet Union to desist from any intervention in the internal affairs of Hungary. The U.S. S. R. vetoed the resolution, whereupon the U.N. General Assembly, on November 9, 1956, called on the U, S. S. R. to withdraw her troops from Hungary so that free elections could be held there under U.N. supervision. On 19th was November, 1956, the Soviet Foreign Minister told the General Assembly that Soviet troops would be withdrawn from Budapest as soon as the situation was there restored to normal. On December 4, the General Assembly adopted a resolution noting with concern that the Soviet government had failed to comply with the United Nations resolutions and called upon the governments of Hungary and U.S. S. R. to permit U.N. observers to enter Hungary and make an investigation. On December 12, 1956, the General Assembly condemned the Soviet Union for violating the Charter and depriving Hungary of its independence and the Hungarian people of the exercise of their fundamental rights.

On the 10th January, 1957, the General Assembly appointed a special committee consisting of representatives of Australia, Ceylon, Denmark, Tunisia and Uruguay, to investigate into the Hungarian uprising by collecting evidence and receiving information. The recommendations of the Committee could not, however, be carried out.

On the 10th September, 1957, the General Assembly passed a resolution sponsored by 36 nations accusing the Soviet Union of depriving Hungary of its liberty and political independence and the Hungarian Government of violating human rights and freedoms.

13. Tunisia.—In June 1958 Tunisia alleged in the Security Council that the presence of French forces on her soil against her will was a permanent provocation to her government and people. On the 17th June, however, France agreed to withdraw all her armed forces from Tunisia within four months, with the exception of the air and naval base at Bizerta. The two Governments also agreed that they would begin negotiations to establish a proper status for the base at Bizerta after the evacuation of troops had been concluded.

This topic has exhaustively been discussed earlier in Chapter XIV (pp. 168-171).
 The topic has been discussed earlier on 'pages 149 & 150 ante (Chapter XII 'Intervention').

14. Racial bloodbath in South Africa.—Tension was brewing from some time past in the Union of South Africa as the Africans struggled for more freedom. It exploded in a wave of blood and death on the 21st March, 1960, when the police opened fire on thousands of demonstrators in Sharpeville and in Langa township near Capetown resulting in the death of a large number of Africans. This brutal act of the South African government was condemned by the governments of India, United States, United Kingdom, U. S. S. R. and others.

The Afro-Asian group in the United Nations moved for an emergency session of the Security Council to consider the South African question. In the Security Council they deplored the high-handedness of the Union and strongly disputed South Africa's contention that the matter was under South Africa's domestic jurisdiction.

On the 1st April, 1960, the Security Council passed by nine votes to none, with France and Britain abstaining, a resolution formulated by the Afro-Asian members. The resolution deplored the disturbances in South Africa and recognised that the situation had led to international friction. It requested the Secretary-General to confer with the South African Government and make practical arrangements to adequately help in upholding the purposes and principles of the United Nations Charter in that country.

It is regrettable that even though apartheid has been before the United Nations since 1946, the lack of response on the part of the Government of South Africa has hindered any permanent settlement of the problem.

The date of March 21, the anniversary of the killing in 1960 of 68 African demonstrators at Sharpeville, South Africa, has been designated by the United Nations as the annual International Day for the Elimination of Racial Discrimination.

July 14, July 22 and August 9, 1960. In the July 14 resolution it called upon the Government of Belgium to withdraw its troops from the territory of the Congo and authorised the Secretary-General to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with the military assistance, as may be necessary. In the July 22 resolution the Security Council called upon the Government of Belgium to implement speedily the Security Council resolution of July 14, 1960, on the withdrawal of their troops and authorised the Secretary-General to take all necessary action to that effect and requested all states to refrain from any action which might undermine the territorial integrity and the political independence of the Republic of the Congo. In the August 9 resolution the Security Council called upon the Government of Belgium to withdraw immediately its troops from the Province of Katanga.

The resolutions of the Security Council of the 14th and 22nd July, 1960, though not explicitly passed under Chapter VII, were passed on the basis of an initiative under Art. 99 of the Charter, which provides that the Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. There is little room for doubt that the members considered the situation as one involving a threat to the peace. Under Art. 25 the Security

Council called upon Belgium to withdraw its troops, while under Art. 49 other members were required to join affording mutual assistance in carrying out the measures called for by the Security Council.

The United Nations force in the Congo was established under the Security Council decision of July 14, 1960, and differed materially from the conception of the United Nations Emergency Force employed in Korea, inasmuch as in the latter a particular country, namely the United States, had been entrusted with the responsibility of providing independently for a multi-national force to serve the purposes laid down by the Council, while in the present case the Force in the Congo was established by the Secretary-General acting under authorization of the Security Council, the force being a subsidiary organ of the Security Council, acting exclusively under the command of the Secretary-General as the agent of the Council.

The Secretary-General followed the same principle in the composition of the Congo Force as was done in the case of the United Nations Emergency Force in Korea, namely that there would be no military units from any of the permanent members of the Security Council.

The Secretary-General refused to accede to the request of the Central Government of Congo that United Nations troops be used on behalf of the Central Government to subdue the Provincial Government in Katanga or to force it to a specific line of action by his adherence to the principle of non-intervention in internal conflict, and this stand of the Secretary-General received approbation in the resolution of August 9, 1960, adopted by the Security Council. However the reports of tribal warfare and slaughter of civilians, including women and children, in other parts of the Congo on account of opposition to the Central Government, brought out a report from the Secretary-General that he could not view these actions merely as examples of internal political conflict and he affirmed that the protection of civilian life in these cases might render necessary the temporary disarming of Conturned to irresponsible marauding.

In the Emergency Special Session of the General Assembly, a resolution was adopted on the 20th September, 1960, requesting the Secretary-General to continue to take action under the Security Council resolutions to assist in maintaining law and order.

On the 21st February, 1961, the Security Council adopted a resolution authorising the United Nations troops to use force in the last resort to prevent civil war in Congo. It condemned the unlawful arrests, deportations and assassinations of political leaders of the Congo, pleaded to the authorities in Leopoldville, Elisabethville and Kasai immediately to put an end to such practices, called on the United Nations authorities in the Congo to take all possible measures to prevent the occurrences of such outrages.

The Secretary-General characterised the United Nations action in the Congo as the biggest single effort under United Nations colours organised and directed by the United Nations itself. The key provisions of the Security ing of the Congolese Parliament under U. N. protection were, however, inally implemented when the Parliament approved on the 2nd August, 1961, a new Government headed by M. Cyrille Adoula.

16. Armed Conflict between Pakistan and India: Pak. infiltration in Kashmir.—In the month of August 1965, Pakistan, losing all patience and anxious to settle the Kashmir issue in her favour through the force of arms, sent thousands of infiltrators into Kashmir. These infiltrators were well organised and trained in sabotage and subversive warfare and the whole operation was conceived, planned and executed by Pakistan. They were, in fact, members of the Pakistani armed forces. Such action by Pakistan was a clear violation of the Charter of the United Nations and of the 1947 ceasefire agreement. The purpose was to weaken the existing government of Kashmir through acts of sabotage and instigate the Muslims of Kashmir to rise in revolt against the same government. Apparently, after their tragic experience of 1947, the Kashmiris were in no mood to espouse the cause conceived by Pakistan and they strongly rallied round their government to crush the infiltrators. Hundreds of infiltrators were killed by the Kashmir police and Indian security forces and many others were rounded up.

But in order to prevent further infiltration it was necessary that the points through which the infiltrators sneaked in should be well guarded. This called for manning by Indian troops of the high observation points across the ceasefire line which were in the occupation of Pakistani forces. So the Indian security forces in their right of self-defence captured three observation posts at Kargil. The Indian troops had to capture the posts at Kargil to safeguard the important road link. Since the infiltrators were still pouring in, the Indian army was compelled to annex a few more posts in the Tithwal area. The bulge in the ceasefire line lying between the Indian towns of Uri and Poonch provided a vantage point to the Pakistanis to carry on their incursions. The Indian army decided to "straighten" this bulge so as to bar further infiltration. Operations to execute this decision were successful and the Indian troops captured the Pakistani posts in that area one by one.

Raids on the Indian side of ceasefire line.—Lt. General Nimmo, the U. N. Chief Military Observer in Kashmir, sent a report to the U. N. Secretary-General stating that investigations conducted by the U. N. observers had established the fact of raids on the Indian side of the ceasefire line. The report confirmed the attempted acts of sabotage and subversion by the Pakistani raiders and referred specifically to a number of acts of destruction within the Indian territory carried out by them.

Massive attack by Pakistan across the ceasefire line and international frontier.—It was clear by now that the Pakistani objective in Kashmir was doomed. In desperation, the Pakistani authorities chose the ultimate course of action. On September 1, 1965, the Pakistani forces, backed by planes and heavy armour, launched a massive attack both across the ceasefire line and the international frontier between the Indian state of Jammu and Kashmir and West Pakistan in the vicinity of Chamb. Not expecting an offensive of such magnitude, the Indian border forces retreated. The Pakistani move seemed to be directed against the Indian positions controlling the lines of communications between Kashmir and the rest of India. On the same day President Ayub of Pakistan said that the Pakistan forces had gone to the assistance of the "freedom fighters", a name that Pakistan had given to the infiltrators.

U N. Secretary-General's Message.—On September 2, 1965, the U. N. Secretary-General, U. Thant, sent a meassage to the Prime Minister of India and the President of Pakistan appealing in the interests of peace that both sides should indicate their intention to respect the ceasefire agreement and the

ceasefire line and that there should be a cessation of hostilities by their armed personnel from both sides of the line and a halt to all firing across the cease-fire line from either side. In his reply Prime Minister Shastri pointed out that the terms of the message were such as might leave the impression that India was responsible equally with Pakistan for the dangerous developments that had taken place. He added that it was essential that Pakistan should undertake forthwith to stop infiltrators and armed forces from the Indian side of the ceasefire line and the international frontier. He further added that India would have to be satisfied that there will be no recurrence of such a situation.

Indian troops move across the border in the Lahore sector.—On September 6, Indian troops moved across the border in the Lahore sector in order to forestall the opening of another front by Pakistan and for the protection of the Indian border. Almost simultaneously Pakistan dropped paratroopers at various places within Indian territory. President Ayub told Pakistan in a nationwide broadcast on the same day "We are at war". No formal declaration of war, however, was forthcoming from either side.

Security Council's Resolution of September 4, 1965.—On September 4, 1965, the U.N. Security Council unanimously called for an immediate cease-fire in Kashmir and urged India and Pakistan to respect the ceasefire line in the territory and have all armed personnel of each party withdrawn to its own side of the line. India's case from the very beginning was that Pakistan should be condemned as an aggressor and be instructed to withdraw from all parts of the Indian State of Jammu and Kashmir. Pakistan, however, asserted that a cessation of hostilities was linked with the question of a plebiscite in Kashmir. She insisted that a guarantee for plebiscite must precede a ceasefire.

Security Council's Resolution of September 6.—On September 6, 1965, after the Secretary-General reported that he had received no official response from either Government to the cease i re resolution, the six non-permanent members of the Security Council, viz. Bolivia, Ivory Cost, Jordan, Malaysia, Netherlands and Uruguay, jointly sponsored a resolution calling upon the parties to cease hostilities immediately and requesting the Secretary-General to exert every possible effort to give effect to this resolution and that of September 4. This resolution was adopted unanimously by the Council.

On September 17, the Secretary-General asked the Security Council to order India and Pakistan to cease their hostilities. He also urged an India-Pakistan submit meeting in a neutral territory with the good offices of the United Nations.

Security Council's resolution of September 20.—On September 20, the Security Council passed a resolution de nanding that both Governments should order a ceasefire effective from 12-30 r. M. on 22nd September.

On September 22 the Government of India received a message from the U. N. Secretary-General advising India to order unilateral ceasefire in compliance with the relevant provisions of the Security Council's resolution with the provision that Indian troops would fire back if they were attacked. The Indian Government was compelled to reject this proposal on the ground that in a battle which is continuing it is just not possible for one side to ask its soldiers to stop fire leaving the other side free to continue its operations.

Ceasefire.—On September 22, Pakistan agreed to cease fire the next day at 3.30 a.m. The Pakistani Foreign Minister, however, held out a threat to the United Nations that unless the Kashmir question was solved within a reasonable time Pakistan would have to leave the U. N.

On September 22, President Ayub of Pakistan said on the radio that Pakistan had accepted a ceasfire "in the interests of international peace" although the U. N. resolution demanding a ceasfire was "inadequate and unsatisfactory". He did not forget to pay a special tribute to Communist China "the memory of whose attitude", he said, "Pakistan would always cherish". Even as the President was announcing this the Pak, air force was busy in bombing Indian cities in a last minute attempt to cause as much senseless destruction as possible.

Security Council's Resolution of September 28.—The Security Council, on September 18, 1965, unanimously reaffirmed its resolution of September 4, 6 and 20 and called upon India and Pakistan "to urgently honour their commitments to the Council to observe the ceasefire." It further called upon the parties promptly to withdraw all armed personnel as a necessary step in the full implementation of the resolution of September 20.

Security Council's resolution of November 5.—On November 5, 1965, the Security Council yet approved another resolution aimed at strengthening the Council's demands for steps to resolve the India-Pakistan crisis. The resolution demanded the prompt and unconditional execution of a proposal that India and Pakistan name representatives to meet with the representative of U Thant on a plan for withdrawal of troops to positions as of August 5.

# LEGAL ASPECTS OF THE INDO-PAK CONFLICT

Unde lared War .- The Indo-Pakistan armed conflict had some unsual features, not generally associated with or sanctioned by the laws and conventions of war. The war was fought with modern weapons, and, in the case of Pakistan, with highly sophisticated weapons, such as Patton tanks, Sabrejets, sidewinder missiles and 1000-pound bombs, supplied by the United States. And yet it was an undeclared war. The proper formalities for the declaration of war were not initially complied with when Pakistan made a massive attack in the Chamb area across the international boundary between India and Pakistan. The embassies of both the sides remained at their posts and they were not asked to withdraw. Numerous restrictions were, no doubt, placed on , the normal functioning of the embassies in both the countries and the restrictions placed by Pakistan on the Indian Embassy at Rawalpindi were far more severe and, in some cases, inhuman and undiplomatic. In spit of this being an undeclared war, the houses of the Indian High Commissioner and employees were subjected to illegal search by the Pakistani police and their properties were seized illegally. The staff and their family members were harassed and humiliated. By doing so Pakistan threw to the winds the rules of diplomatic immunity. The Indian diplomatic courier was also subject to search by the customs authorities at Karachi airport, an act which is a serious breach of diplomatic immunity.

Prize Court Proceedings.—In spite of there being no declaration of war, Pakistan launched prize court proceedings in respect of Indian cargo illegally seized by her. The prize courts subsequently ordered the confiscation of Indian cargo of jute and tea. The cargo of jute and tea could not be treated as contraband. This was a measure contrary to International Law. Moreover, the confiscation of Indian goods was also illegal as the two countries were not formally at war. Even some shipments meant for India aboard some foreign vessels were offloaded and detained in Pakistan. The rules of contraband do not authorise any country to act in the manner that Pakistan did.

Partisan attitude of U. S. A. and Britain.—The Big powers, most of all the United States and Britain, adopted a partisan attitude and displayed unneutral feelings. An earlier American President, Eisenhower, had given a pledge to Prime Minister Nehru at the time of agreement for military aid between the U. S. A. and Pakistan that if the aid to Pakistan was misused or directed for aggression, the United States would take immediate appropriate action, both within and without the United Nations, to thwart such aggression. But even when the American made tanks rolled across the international boundary, without provocation and with the unconcealed motive of occupation of Indian territories by force and the American Sabrejets bombed innocent civilians in India, President Johnson never thought of redeeming the pledge that Preside nt Eisenhower had given and, to the shock of peace-loving people everywhere, their response was consideration for resumption of military aid to Pakistan and secret despatch of American arms through other countries. It was, therefore, not unfair on the part of India to think that Indian blood had been shed and Indian property destroyed through the instrumentality of American Pattons, Sabrejets and automatic weapons.

In the present crisis, Britain, of all the nations, had been most unfriendly to India. Her representative in the United Nations lent support to Pakistan on inaccurate information and wrong premises. The British High Commissioner in India, John Freeman, had been at pains to explain the British position by saying that the British Prime Minister, at the time of making the initial statement denouncing India's defensive action of September 6, 1965, had not a clear understanding of the circumstances under which the Indian army had to cross the international boundary and the offensive speech of British Prime Minister was the result of ignorance.

Use of Napalm Bombs.—Pakistan used Napalm Lombs against Indian targets, mostly civilian centres and hospitals, during the conflict. The use of such boms is prohibited under the rules governing air warfare.

India's action in self-defence.—India's action against Pakistan was purely in self-defence. It was Pakistan which had sent marauders disguised as civilians into Kashmir. It was Pakistan which first used her army in launching an attack on Indian soil. It was Pakistan again which first sent her planes to bomb Indian cities without a declaration of war. India acted only after these want on acts of enmity and that too only with a view to stall the ominous advance of Pakistani armed forces at several points on the boundary. When the Indian army moved into Pak, territory its object was clear. The objective was not the capture of Pakistani cities and towns, but the crippling of the Pak, war machine that was the permanent source of trouble for peace-loving India.

India's action was fully justified under the provisions of Article 51 of the United Nations Charter. The Pakistani glee at the prospect of isolating India and aggressing into Indian territory in Punjab, Kashmir and Rajasthan was not entirely groundless and in order to checkmate the Pakistani designs and defend the country's vital links of communication there was no option left to India but to make bold military thrusts towards Lahore and Sialkot. The menacing posture adopted by China at that juncture heralded the unpleasant prospect of India having to fight on two fronts and it was all the more necessary in these circumstances to crush the military might of one opponent to be able to pay full attention to the other.

Bombing of civilian areas by Pakistani planes.—Pakistani planes bombed civilian areas, places of worship and hospitals. These acts were

dastardly and barbaric and violated the code of warfare between civilised nations. Such things were unheard of even in the two world wars. Napalm bombs and bombs weighing up to one thousand pounds were dropped on cities and villages having no military significance. The Pakistani air force twice bombed the St. Paul's Cathedral in Ambala—the first attack damaged the church and the second reduced it to rubble. Perhaps the most inhuman act by Pakistan was her attack on hospitals and Red Cross centres. A hospital in Poonch was shelled, eight wards in an army hospital in Ambala were razed to the ground, a jail hospital in Jodhpur was destroyed and four ambulance vehicles were attacked in Ferozepore. The Pakistani planes also attacked a civilian aircraft killing the Chief Minister of Gujarat and his family aboard that plane. All these facts show the callous and indifferent attitude of Pakistan towards the norms of civilised behaviour.

Tashkent Declaration.—The Tashkent Declaration was signed by the Prime Minister of India and President of Pakistan on January 10, 1966. Under that declaration, both sides agreed to exert all efforts to create friendly relations as envisaged in the U. N. Charter and refrain from use of force in settling disputes. They agreed that all armed personnel of the two countries should be withdrawn to positions held prior to August 5, 1965. They agreed to discourage hostile propaganda against each other and restore normal functioning of diplomatic missions. They also agreed to effect repatriation of the prisoners of war and create conditions which would prevent the exodus of minorities. They further agreed to continue meetings at all levels on matters of mutual importance.

Troop withdrawals were effected very promptly and comprehensively. The position with regard to the infiltrators, however, was not very clear. No definite statement was issued by either government as to the whereabouts of the infiltrators.

On March 1, 1966, Mr. U Thant, Secretary-General of the United Nations, commended the implementation of the Tashkent Declaration and said that India and Pakistan had given the world "an example of statesmanship at its best" in the swift implementation of Security Council resolutions and the Tashkent agreement.

Council passed several resolutions directed against the Rhodesian regime which had unilaterally declared its independence from the United Kingdom is November 1965. The situation, constituted by the self-declared independent minority regime in Southern Rhodesia was declared to be a threat to international peace and security. The November-1965 and April-1966 resolutions were in the nature of voluntary sanctions of enforcement action, the latter specifically empowering the British Government to take steps by the use of force if necessary to prevent ships taking oil to ports from which it could be supplied or distributed to Rhodesia. This was the first occasion when the Security Council authorised a single U. N. member to take forcible action which would otherwise be unlawful. In the resolution adopted in December 1966 the Security Council applied selective mandatory economic sanctions (without making provision for enforcement if a state failed to apply them).

The sanctions, however, failed to achieve the desired results on account of lack of co-operation on the part of several member States, notably South Africa and Portugal; but the Council did not even adopt any resolution censuring the aid given by those countries to the illegal regime. On March

18, 1970, the Security Council, after the status of a republic had been assumed by the illegal regime in Southern Rhodesia, condemned the illegal proclamation of such a status and decided that member states should refrain from recognising the illegal regime or giving any assistance to it.

Finally on November 2, 1972, the U. N. General Assembly asked all countries to withhold aid to Portgual, South Africa and Rhodesia until they renounced their policy of colonial domination and racial discrimination. It reaffirmed recognition of the legitimacy of the struggle of the colonial peoples and peoples under alien domination to exercise their right to self-determination and independence by all necessary means at their disposal.

18. War in the Middle East.—On May 14, 1967, Egyptian forces started moving into Sinai peninsula. On May 18, the Government of U.A.R. called for withdrawal of the U. N. Emergency Force from Gaza, which was there to maintain peace in the area. The U.N. Secretary-General acceded to their request. On May 21 General Amer of U.A.R. issued orders for mobilization of reserves. The same day President Nasser of U.A.R. announced that U.A.R. would blockade the Gull of Aqaba for Israeli ships. On May 30, President Nasser, after signing a defence agreement with Jordan, made a statement on the Cairo Radio which included these words:

"We are facing you in the battle and are burning with desire for it to start, in order to obtain revenge. This will make the world realize who Arabs are and what Israel is....."

Clearly this was a battle cry. Responsible quarters all over the world felt disturbed. The U. N. Secretary-General, U Thant, warned the Security Council that the situation in the Near East was "more disturbing, indeed more menacing" than at any time since the 1956 Suez crisis.

During the debate in the Security Council on the Near East situation held in the last week of May, the Soviet delegate called for condemnation of Israel and for the withdrawal of American and British vessels from the area. India appealed in the Security Council for restraint by all parties concerned in the West Asian crisis and warned against attempt by any State or group of States to challenge by force United Arab Republic's sovereignty in the Strait of Tiran. The U. A. R. delegate asserted that the Israeli claim to have rights of navigation through the Gulf of Aqaba was without foundation. He declared that, historically, the Gulf had been under Arab control for more than 1,000 years. He further stated that there was no shadow of doubt that a state of war still existed between U. A. R. and Israel. The Israeli delegate, on the other hand, stated that any interference with freedom of navigation in the Gulf was an act of aggression against Israel.

The Security Council debate, however, failed to produce any concrete measures. The armed forces of several Arab states, including those of U.A.R., Jordan, Syria and Iraq, supported by Russian-made tanks and guns, hemmed in the tiny country of Israel from all sides. The Palestine Liberation Army, composed of volunteers enrolled from amongst the Arab refugees, also stood ready to pounce upon Israel. These preparations, and also the furious din in the whole Arab world seemed to herald the approaching fall of Israel. Tension mounted up to an unprecedented pitch in the last week of May and the first few days of June, 1967.

It was, however, Israel and not the Arab states that struck first. In the morning of June 5, the Israeli bombers, in a lightning operation, destroyed hundreds of enemy planes arrayed in airfields far inside the Arab territory.

Simultancously, the army of Israel invaded U. A. R., Jordan and Syria. The next day, the U. A. R. air force was crippled and it went out of action. The Israeli army, aided by warplanes, cut across Arab formations in Sinai. By June 8 the whole of Sinai peninsula was in Israeli hands as also the part of Jordan lying west of River Jordan, including the Arab sector of Jerusalem. The Israeli army had reached the eastern bank of Sucz Canal and was making preparations for crossing it. It was clear that the Arab forces had been crushed, at least for the time being.

The whole operation was so swift and so unexpected that others could do very little. A hurriedly called session of the Security Council on June 7 demanded immediate ceasefire by both sides. Israel was agreeable, but the Arabs stoutly rejected it. The Soviet Union at first insisted on the immediate withdrawal of Israeli forces from Arab territories, but later agreed to a ceasefire lased on the line of actual control. This infuriated the Arabs and Soviet Embassies in some Arab capitals were stoned. But the Soviet decision to accept a compromise, it appears, was based on a realistic appraisal of the whole situation. The Soviet authorities had realised that the Israeli forces were now at the top and a couple of days of more fighting would result in an Israeli occupation of Cario and Alexandria, and in effect the whole of Egypt. This situation the Soviets wanted to avoid. Ultimately on June 8, 1967, the government of U. A. R. accepted the ccasefire, followed by other Arab States. Jordan had already sought truce with Israel on the second day of fighting.

The U. N. Security Council demanded on June 9, 1967, that hostilities between Israel and Syria cease forthwith. Both the countries notified their acceptance scon after.

Now that they were in tight control over large tracts of Arab territories, the Israelis were reluctant to leave them. They insisted on direct talks between Israel on the one hand and the Arab states on the other, unhindered by third party interference, before steps could be taken for withdrawal. This the Arabs would not agree to. It appeared that they failed to accept the fact that they had been defeated.

The Suez Canal was closed to all shipping thus causing great financial loss to U. A. R. During the wartime, the Arab countries had imposed a ban on export of oil to Western countries and this ban continued even after the war ended. Since oil is the main revenue-earner for these countries, the oil ban almost rocked their economic structures. It was quite clear by now that the Arab adventure cost them a great deal.

On July 4, 1967, the General Assembly rejected for want of the required two-thirds majority a proposed call on Israel to withdraw immediately all her forces from Arab territory to the positions they occupied before hostilities broke out.

On November 22, 1967, the Security Council, however, unanimously adopted a British compromise resolution on West Asia calling for withdrawal of Israeli armed forces from Arab territories occupied in the recent conflict and an end of all belligerency in order to establish just and lasting peace in the area. The resolution also requested the Secretary-General U. Thant to designate a special representative to proceed to the West Asia to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement.

The Charter provides various courses of action for peaceful settlement

of disputes. Israel did not have recourse to any of them and struck the first blow in pursuance of the concept of 'preemptive strike or preventive war,' a concept which no doubt is contrary to the United Nations Charter. Israel therefore cannot be allowed to confront the world with a fait accompli, attempt to impose a new status quo and achieve a new balance of power in the region, specially when the threat of war is completely over. Lasting peace in the region can be based only on unconditional withdrawal of Israel from the areas now under its occupation and rightly belonging to the UAR., Jordan or Syria. Israel cannot be allowed to establish its right in respect of territories which are the fruits of aggression. Territorial disputes cannot be settled and boundaries cannot be adjusted through an armed conflict. If the United Nations were to acquiesce in the proposition that the victor in an armed conflict could defy the United Nations mandate and violate the basic principles of the Charter, that might mean the end of the world organization.

 Soviet Intervention in Czechoslovakia.—On 21st August, 1968, the Soviet Union, supported by East Germany, Hungary, Poland and Bulgaria, occupied Czechoslovakia without any provocation.

The U. N. Secretary-General U Thant deplored the Soviet invasion. President Johnson of the United States termed the action of the Warsaw Pact allies as one in flat violation of the United Nations Charter. The British Prime Minister Harold Wilson said that the action was a flagrant violation of the United Nations Charter and of all accepted standards of international behaviour. The Indian Prime Minister Indira Gandhi urged the Soviet Union and its Warsaw Pact allies to withdraw their forces from Czechoslovakia. The French Government deplored the intervention of Soviet troops as a blow to the rights of a friendly nation. Federal Republic of German Chancellor Kurt Georg Kiesinger said that the invasion was a clear violation of Czechoslovak sovereignty and interference in its internal affairs. Sweden, Australia, Philippines, Norway and Yugoslavia also condemned the invasion as a breach of the U. N. Charter of International Law and practice.

The Soviet Government, however, announced that the troops entered Czechoslovakia at the request of Czechoslovak officials to meet a threat to the socialist system and said that the request for urgent assistance had been made by the Czech communist party and Government leaders of Czechoslovakia.

At a specially convened meeting of the Security Council on 22nd August, 1968, the U.S., Britain and France together with seven other countries submitted a resolution condemning the Soviet action and calling for an immediate withdrawal without violence or reprisals. The Soviet Union vetoed the resolution. India abstained from voting; she supported the full text of the resolution save the portion which sought to condemn the Soviet Union and its Warsaw Pact allies for "armed intervention" into Czechoslovakia.

The same day, Mr. Jan Muzik, head of the Czechoslovak delegation at the U. N., made a formal protest at the presence of Russian troops in Czechoslovakia and called for their withdrawal without delay.

President Svoboda of Czechoslovakia and other top leaders of the country were summoned to Moscow for talks. On 27th August accord was reached between the Czech and Soviet leaders, whereby it was agreed that the existing Czech leadership would continue to function and the Soviet

troops would withdraw from Czech territory, excluding the areas adjacent to Czechoslovakia's borders with West Germany and Austria. The Czech leaders agreed to reintroduce censorship of the press and other mass media, and to guide the country on Marxist-Leninist lines. The Government of Czechoslovakia requested the Security Council to withdraw immediately from its agenda the question of the presence of Warsaw Pact forces in its territory.

The accord was not given a warm welcome in Czechoslovakia, however. Some of the ministers resigned from their posts, some others, including Vice-Premier Ota Sik, were discharged. The continuing leaders tried to control the rising tide of popular frustration by giving wild assurances which they were hardly in a position to implement. The policy of the Soviet Union all the time was to keep up pressure on the Czech leadership and urge it to restore 'orthodox' Communism under Russian guidance through firm and merciless measures.

Legal and Political Aspects of the Soviet Intervention in Czechoslovakia.—The Soviet armed intervention in Czechoslovakia on August 20, 1968, took the world by surprise. Apart from purely humanitarian and moral considerations involved, the intervention gave rise to serious legal and political questions.

The initial Soviet explanation to the world was that they and their allies had crossed the Czechoslovak border at the invitation of some leaders of the Party and Government of Czechoslovakia whom they consistently refused to name. The hollowness of this explanation, however, was apparent at the very time it was offered, since only eight months back the Czechoslovaks had elected a government by a thumping majority and as this government was in power it alone was legally entitled to call for foreign intervention, if at all.

The Soviets also asserted that they had the right to interfere under the provisions of the Warsaw I act. We shall have to study the relevant provisions of the said Pact in the light of their assertion to find out whether it was correct. The Warsaw Pact was concluded in 1955 between the Soviet Union and the Communist countries of East Europe with express purpose of counteracting "the situation created in Europe by the ratification of the Paris agreements, which envisage the formation of a new military alignment in the shape of Western European Union.' with the participation of a remilitarised Western Germany and the integration of the latter in the North Atlantic bloc, which increases the danger of another war and constitutes a threat to the national security of the peaceable States." The Warsaw Pact, therefore, was essentially a defensive pact. Further, and this is very important, the Pact recognised all the East European members as "States", with the qualifications of sovereignty and individuality that are inseparable from the definition. Article I of the Pact is as under:

"The Contracting Parties undertake, in accordance with the Charter of the United Nations Organization, to refrain in their international relations from the threat or use of force, and to settle their international disputes peacefully and in such manner as will not jeopardise international peace and security." (Italics of the author). Article I, therefore, is a guarantee against the use of force for international settlement of issues. Moreover, it is a commitment to abide by the United Nations Charter, which specifically prohibits the use of force for settling disputes among nations. In this view of the matter, the Soviet intervention in Czechoslovakia was unmistakably an act of aggression.

The entire Soviet case restsed on the assumption that there was intervention by the U. S. and West European states in Czechoslovak affairs. The Soviet position was summed up 1y Todar Zhivkov, Bulgarian Prime Minister, when he was in India in January 1969, as follows:

"The events in Czechoslovakia were provoked by the external and internal forces of reaction. They were aimed at undermining the foundations of the existing order and at disrupting the fraternal relations between Czechoslovakia and other European socialist countries......The attack against the socialist system in Czechoslovakia was not and could not be an internal matter only. It was openly directed against the status quo in Europe. It was aimed at changing the correlation of forces in favour of reaction and imperialism. Naturally, the socialist countries could not allow this. The joint action of the five socialist countries frustrated attempts and prevented a dangerous development of things which could have had serious consequences to peace in Europe and the world."

To counter unabated criticism, emanating from countries of either bloc, refuge was sought by Soviet apologists in the double-edged jargon of Marxist dialectics. In effect, the Soviet argument says that to denounce their invasion of Czechoslovakia is to measure events with a bourgeois yardstick, the "class approach" being the concession that Soviet Union is within its rights to force its ideological allies to keep to pre-set tracks. Ironically, in specific instances, the limitation to the "laws of class struggle" does not come from the "correct class criterion, but rather, as in the case of China, from the military might of the heretic Needless to say, this sort of approach towards international relationship runs counter to the spirit of the United Nations Charter.

We may now turn to the political implications of the Soviet action.

The Soviet action showed, for the first time, that armed conflict between Communist countries was possible. According to the doctrine of Karl Marx, as also the consistent declarations of the Communist statesmen and theoreticians, a war between two "workers' states" was unthinkable. No doubt tension was at its height in the early fifties when Soviet Union turned its propaganda machinery against Yugoslavia, and more, recently when China openly challenged Russia in the ideological arena. With the occupation of Czechoslovakia, this possibility turned into an ugly reality.

The intervention also serves as a fearful precedent for all Communist countries that want to develop their societies in their own way, suited to their own national aptitudes and flavoured by their distinct historic traditions. The intervention, in effect, was an ultimatum to all weaker Communist states to conform to the Soviet model, or risk a Soviet take-over. In essence, the Soviet interpretations hoil down to something like this: "You must mould your society into the pattern evolved by us, because we are the mightiest power in the Communist world and we will not hesitate to use force if you don't," or, in even shorter form, "Conform or perish". The spectre of following punitive action, in the event of violation of this commandment, must henceforth haunt the revoluntionary movements all over the world which have made a Communist society their goal. In fact, the Soviet action has split up the already splintered Communist world, evidenced by the angry intonation of the speeches delivered at Communist conventions in Sofia, Paris, Rome and elsewhere, by 'the rebellious censure of the action by the governments of Yugoslavia and Romania, by its open condemnation by China and Albania.

It was nobody's prediction that the United States would rush to the aid of Czechoslovakia when the Soviet tanks rolled in. Even then, some firm political and economic measures could be taken by the U. S. government to substantiate its professed disapproval of the action. Whatever words of condemnation were uttered by the official spokesmen of the U.S. seemed to be conditioned more by the wrath of the American people than by a serious concern for the freedom and well-being of the Czechoslovak people. Even Dean Rusk's rhetoric laments at the U. N. meeting seemed to be stagemanaged. The U.S. official circles seemed all too willing to resume dialogue with the Soviet Union as soon as the public indignation in the United States cooled off. All this leads us to another harsh reality of the present-day world, that is the existence of geo-political spheres of vital interest to the two superpowers, the U. S. and the U. S. S. R. American officials have denied the existence of "spheres of influence" and no doubt the Soviet leaders will also do so if confronted. But the picture of Soviet-American relationship that emerges after a close study of world events is one of a tacit understanding between the two powers to avoid serious involvement beyond one's own sphere of interest. This situation is reminiscent of the days of imperialism before the Second World War. The natural corollary of such an understanding would be that the Soviet Union would not physically entangle itself when the U. S. makes some move in, say, Latin America. We now have a clue to the Soviet withdrawal from Cuba, to the Soviet inaction when Israeli troops occupied the Sinai peninsula, or to the American posture of neutrality when Russian army quelled the Hungarian uprising. Shocking as this state of affairs may seem, it is nonetheless a basic fact of contemporary political life that the fate of smaller states is governed by the security equations of the super-powers, that until a more equitable order is established the smaller states will only serve as factors in the grand design of the super-powers. This has been the bitterest lesson of the Soviet intervention in Czechoslovakia.

The Czechoslovak episode was not devoid of interesting and educative sidelights. It demonstrated beyond all doubt that a people may yet yearn for political and cultural freedom even when their material wants are satisfied. Czechoslovakia is a developed nation as nations go, and one of the world's most highly industrialised societies. The Marxist theory that there is no freedom beyond economic freedom stands discredited after what happened in Czechoslovakia. So does the theory of universality of the working class movement. The Soviet action and the Czechoslovak resistance showed that even after conversion to Communism, nations remain as distinct as ever and national interests weighed supreme in the minds of the Kremlin bureaucrats as in the hearts of Czech and Slovak patriots. No doubt the Czechoslovaks did not take up arms. But there is evidence to suggest that they would have done so if only their leaders had issued a call. And they would have offered the Russian troops a long and bitter fight in which the Russians might not necessarily have emerged as victors. The conclusion therefore follows that the Communist nations also can fight each other, and that in course of time this possibility may flare up in bloody, violent strifes that may endanger the peace of the world. The Soviet insistence on reimposition of censorship in Czechoslovakia established beyond doubt that freedom of expression is viewed askance by Communist leaders. It follows that the Communist society, bereft of intellectual freedom, can only be expected, in the long run, to achieve an abnormal, lop-sided development, which, considering that the Communist world embraces nearly half of humanity, does not augur well far human civilization as a whole.

20. Indo-Pak, War, 1971.—On the 3rd of December, 1971, Pakistani bombers crossed over into India and, in a massive operation, attacked Indian airports at Srinagar, Pathankot, Amritsar and seven other places. India retaliated to Pakistan's massive air attack of December 3 by bombing eight of their bases, including Masroor near Karachi in the west, and Dacca and Jessore in the east from ab ut midnight. Simultaneously the Indian navy inflicted heavy losses at Chittagong post and captured a Pakistani merchant ship while on its way from Bangladesh to Karachi. On the 4th of December the Pakistani President declared a state of war with India.

Security Council's resolutions.—On December 4, 1971, the Security Council was called into emergency session to consider the deteriorating situation which led to armed clashes between India and Pakistan; and the United States of America moved a resolution calling upon India and Pakistan for an immediate ceasefire and military withdrawal and authorising the U. N. Secretary-General to place observers along the Indo-Pakistan borders to report upon the implementation of the ceasefire and troop withdrawal. The Soviet Union vetoed the resolution.

On December 6, 1971, the Government of India recognised the People's Republic of Bangladesh headed by Fajuddin Ahmad, it being the eighth most populous nation of the world. Pakistan simultaneously announced break-off of diplomatic relations with India. India also broke off diplomatic relations with Islamabad as a recip real measure on December 7, 1971.

On December 6, a second resolution calling for cease-fire and with-drawals by Indian and Pakistani forces was sponsored by the United States in the Security Council. Britain and France abstained once again, and the Soviet Union again vetoed the resolution. The Soviet Union charged that the U.S. resolution was one sided any equated India with Pakistan. India made it clear that any resolution that did not bring about Pakistani military withdrawal from Bangladesh would be unacceptable to it.

Earlier the Soviet draft resolution which called upon the parties concerned, as a first step, for an immediate cease-fire and cessation of hostilities and simultaneously called upon the Government of Pakistan to take effective action towards a political settlement in East Pakistan, had failed for lack of sufficient votes.

General Assembly's resolution.—On December 7, Argentina and 31 other nations laid before the General Assembly a resolution calling for immediate ceasefire and withdrawal of all troops on their own side of the Indo-Pakistan orders. The resolution was passed by 104 votes against 11, with 10 abstentions.

India rejected the ceasefire call and its representative said that no United Nations resolution could be implemented unless it took into account the freedom movement and withdrawal of Pakistani troops from Bangladesh.

In the meantime Pakistani troops lost more ground in Bangladesh and retreated towards Dacca.

Security Council's third resolution.—On December 12, 1971, the United States of America made another bid at the Security Council meeting to call upon India to comply forthwith with the General Assembly's resolution for a ceasefire and withdrawal of troops. The resolution fell through on December 13, following a Soviet veto.

Resignation of East Pakistan Governor and cease-fire.—As the combined forces of the Indian army and Mukti Bahini tightened theirnoose around the Pakistani concentration in Dacca, Lt. General Farman Ali, the military adviser to the Pak. Governor in Dacca, the East Pakistan Governor Dr. A. M. Malik, his council of ministers and top occupation officials resigned their jobs and took refuge in the neutral zone set up by the International Red Cross at the Hotel Inter-continental at Dacca. On December 15, Lt. Gen. A. A. K. Niazi sent a message through the U. S. embassy to the Indian authorities asking for a cease-fire. As a token of his good faith, the Chief of the Indian Army Staff, Gen. Manckshaw, ordered pause in air action over Dacca from 17 hours on December 15, till 3 p. m. December 16.

On or about December 10, the U.S. Government ordered the despatch of a task force of the Seventh Fleet to the Bay of Bengal, then stationed in the South China Sea. The motive behind that move could have Leen a bid to pressurise India to accept the cease-fire resolution passed by the General Assembly, intended as a show of force to overawe India, or to evacuate the strangled Pakistani soldiers to more friendly shores. In any case, the gesture of the United States was almost warlike, using gross blackmail and pressure against India in violation of the U.N. Charter.

The Pak, troops ultimately surrendered unconditionally to the Indian army which had battled its way to Dacca in concert with the Mukti Bahini, and the People's Republic of Bangladesh emerged into freedom on the 16th of December, 1971.

India announced a unilateral ceasefire even on the wastern front to be effective from December 17 at 8 a. in.

The ceasetire, voluntarily and unilaterally proclaimed by Prime Minister Indra Gandhi was accepted by President Yahya Khan and it came into effect on December 17, 1972. The 14-day Indian-Pakistan war thus formally ended.

U. N. Council meets again.—India's unilateral ceasefire on the western front after the war aims had been achieved caught the United States,. Communist China and their friends completely off balance. The U.N. Security Council was stunned. Ultimately it adopted on December 21, 1971, a resolution calling for a durable cease-fire and cessation of all hostilities in all areas of conflict in the Indian sub-continent until troop withdrawals take place as soon as practicable.

Failure of U. N. machinery.—Even though the barbarities committed in East Pakistan by military rulers of West Pakistan put to shaine the ruthless massacre prepetrated by Nazi hordes during the second world war, the so-called conscience of the United Nations could not be stirred. The clatter of machine-gun, the roar of artillery and the thud of bombs mercilessly used on unarmed civilian population in East Pakistan, including women and children, failed to draw the official attention of the civilised world. Instead of humanity transcending politics, politics dominated the entire scene and all the nations remained quiet and proffered help only to alleviate the suffering of the human tragedy being enacted in East Pakistan. The brutal and unprovoked ktllings by West Pakistani forces were in the teeth of the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948. It ultimately led to the flight of nearly one crore of people from East Pakistan into India, which was also a wanton act of aggression against India.

The United Nations showed its utter incapacity to discharge its primary function of maintaining peace. It ended the dream of credibility of the United Nations. The inability of the U.N. to prevent the outbreak of war between India and Pakistan, and, even more seriously, to put an end to it once it had broken out, causing death and suffering to millions, stood as a grave setback to the world body. The International Commission of Jurists deplored that the United Nations failed to use the available machinery to deal with the situation in East Bengal following the Pakistani army crack-down in March 1971.

#### CHAPTER XXXIV

## COLLECTIVE SECURITY

The provisions of collective security as envisaged by the Covenant of the League of Nations and the Charter of the United Nations have been adverted to in earlier chapters and may be discussed here in a somewhat greater detail.

League Covenant.— Under Art. 10 of the Covenant the members of the League undertook to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. Under Art. 11 any war or threat of war, whether immediately affecting any of the members of the League or not, was a matter of concern to the whole League, and the League was required to take any action that might be deemed wise and effectual to safeguard the peace of nations. In case of any such emergency the Secretary-General was required to summon at once a meeting of the Council on the request of any member of the League.

Under Art. 12 the members of the League agreed that, if there should arise between them any dispute likely to lead to a rupture, they would submit the matter either to arbitration or judicial settlement or to inquiry by the Conneil, and they agreed in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council. The award of the arbitrators or the judicial decision was to be made within a reasonable time, and the report of the Council was to be made within six months after the submission of the dispute.

Under Art. 13 the members of the League agreed that whenever any dispute should arise between them which they recognised to be suitable for submission to arbitration or judicial settlement, and which could not be satisfactorily settled by diplomacy, they would submit the whole subject-matter to arbitration or judicial settlement.

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, were declared to be among those which were generally suitable for submission to arbitration or judicial settlement.

These disputes were to be referred to the Permanent Court of International Justice or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.

Article 15 provided that if there should arise between members of the

League any dispute likely to lead to a rupture, which was not submitted to arbitration or judicial settlement in accordance with Art. 13, the members of the League agreed that they would submit the matter to the Council. The Council was required to endeavour to effect a settlement of the dispute. If such efforts were successful, a statement was to be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council might deem appropriate. If the dispute was not thus settled, the Council was to publish a report containing statement of the facts of the dispute and the recommendations which were deemed just and proper in regard thereto.

Article 16 provided that should any member of the League resort to war in disregard of its covenants under Arts. 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other members of the League, which undertook immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals, and the nationals of the covenant-breaking state, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a member of the League or not. It was the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League. The members of the League agreed that they would mutually support one another in the financial and economic measures which were taken under the article in order to minimise the loss and inconvenience resulting from the above measures, and that they would mutually support one another inresisting any special measures aimed at one of their number by the covenant-breaking State, and that they would take the necessary steps to afford passage through their territory to the forces of any of the members of the League whi h were co-operating to protect the covenants of the League. Any member of the League which violated any covenant of the League was to be declared to be no longer a member of the League by a vote of the Council.

Under Art. 17 of the Covenant, in the event of a dispute between a member of the League and a non-member or between non-members, the non-member State or States were to be invited to accept the obligations of membership in the League for the purposes of such dispute. On such invitation being accepted, the provisions of Arts. 12 to 16 were to be applied. Upon such invitation being given the Council was immediately to institute an enquiry into the circumstances of the dispute and recommend such action as might seem best and most effectual in such circumstances. In case of a non-member State refusing to accept the obligations of membership in the League for such purposes and resorting to war against a member of the League, the provisions of Art. 16 were made applicable as against the State taking such action. If both parties to the dispute refused to accept the obligations of membership in the League for the purposes of such dispute, the Council could take such measures and make such recommendations as would prevent hostilities and result in the settlement of the dispute.

Charter of the United Nations.—Chapter VI of the Charter deals with investigation, and pacific settlement of disputes. It enjoins on the parties to any dispute, the continuance of which is likely to endanger international peace and security to seek a solution first by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, report to regional

agencies or arrangements, or other peaceful means of their own choice. The Security Council might investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security. Any member of the United Nations might bring any dispute, or any such situation to the attention of the Security Council or of the General Assembly. A State not being a member of the United Nations could do so with regard to any dispute to which it was a party if it accepted in advance, for the purposes of the dispute, the obligations of pacific settlement in the Charter.

Chapter VII makes provisions for collective security determining ther existence of any threat to the peace, breach of the peace, or act of aggression and empowers the Security Council to decide what recommendations o measures shall be made or taken to maintain or restore international peace and security. (Art. 39). In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures. (Art. 40). It may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures, These may include complete or partial interruption of economic reltaions and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. (Art. 41). If it considers that measures provided for in Art. 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be ncessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of members of the United Nations. (Art. 42).

All members of the United Nations, in order to contribute to the maintenance of international peace and security, have undertaken to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. (Art. 43).

When the Security Council has decided to use force it shall, before calling upon a member not represented on it to provide armede forces, invite that member, if the member so desires, to participate in the decisions of the Security Council conce ning the employment of contingents of that member's armed forces. In order to enable the United Nations to take urgent military measures, members shall hold immediately available national air force contingents for combined international enforcement action. The strength and shall be determined by the Security Council with the assistance of the Military the Security Council with the assistance of the Military the Security Council with the assistance of the Military Staff Committee.

There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security,

the employment and command of forces placed at its disposal, the regulation of armaments and possible disarmament. (Art. 47).

The action required to carry out the decision of the Security Council for the maintenance of international peace and security shall be taken by all the members of the United Nations or by some of them, as the Security Council may determine. Such decisions shall be carried out by the members of the United Nations directly and through their action in the appropriate international agencies of which they are members. (Art. 48). The members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council. (Art. 49). If preventive or enforcement measures against any State are taken by the Security Council, any other State, whether a member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems. (Art. 50).

Finally Art. 51 provides that nothing in the Charter shall impair the inherent right of individual or collective sef-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The Failure of Collective Security.—The League of Nations failed to preserve the peace as envisaged in the Covenant. In 1931 it failed to prevent Japanese aggression against China in Manchuria. In 1935 Abyssinia was invaded by Italy, and the former appealed to the League under Art. 10 of the Covenant. The League thereupon resorted to economic and financial sanctions against Italy, but the various constituent members did not fulfil their obligations and the action of the League to enforce peace upon the aggressor failed. Italy withdrew from the League and conquered Abyssinia. Rhineland was occupied by Germany in 1936. Austria was annexed by Germany in 1938 and Czechoslovakia in 1939. But the League could not take any effective action against the aggressor. The League stood by helpless while Russia invaded Finland in 1939. It could only manifest its displeasure by expelling the Soviet Government. The failure of the League to maintain peace resulted in the colossal tragedy of the Second World War.

The Second World War brought forth new problems due to technological improvements in the methods of warfare. The hopes and desires centred round the United Nations and its Charter to provide an effective machinery for people to live together in peace, and that hope has sustained the peace-loving people in face of the cold war and the ideological conflict between the Soviet world and the Western countries. The need for understanding the people of other countries is sometimes forgotten and that makes the difference of outlook between the counties of the world. This has resulted in widespread and superstitious beliefs in the maintenance of peace through regional pacts. In order to have a correct appraisal of the United Nations one has not to look to its success or failure in achieving a solution of a particular problem, but whether it provides the means for building international peace and fellowship. Surely it has created a sense of world community in spite of the association being based on the sovereign equality of its members.

The Security Council had to sanction effective collective measures against aggression and breaches of the peace in the case of Korea in 1950 and had to take effective steps in stopping the Israeli aggression on Egyptian territory followed by an Anglo-French attacks towards the end of October 1956. The various measures have been discussed in great detail earlier. Suffice it to say here that the United Nations was greatly successful in restoring peace and preventing aggression in these disturbed areas.

Balance of Power.—It has been said that International Law seeks to transform the system of balance of power into a system of collective security. This aspect may be analysed to find out the effectiveness of the United Nations towards the realization of this particular objective.

In the past, and particularly during the eighteenth and nineteenth centuries, the major European powers relegated to themselves the authority to decide the fate of the entire European continent. They had established a sort of hegemony over the less powerful kingdoms and principalities and were the final arbiters in questions involving the change of boundaries of their territories. Towards this end, they had formed concerts, leagues, alliances and the like, but actually behind this facade of magananimity and big-brotherly benevolence, there lay the principle that no major power should alone aggrandise itself at the expense of the tiny states that were involved in disputes inter se. distrust and apprehension of the might of others were the normal bedfellows of these big powers and by the singular device of 'balance of power' or maintenance of the status quo, they evinced the ferevent desire of dispelling both the While as a matter of fact, the smaller states constantly felt themselves indebted to the bigger ones for the benign assurance of protection and assistance in times of aggression by other states, the real motive behind this benevolence of the big powers was the establishment of a large number of buffer states that held at bay competing claims nourished sub rosa by rival powers. They arrogated to themselves the right to decide which of the smaller states deserved retribution for initiating the breach of international peace and reserved to themselves the prerogative of intervention, ostensibly in the interest of maintaining peace and security in the European continent, but in reality to prevent others from gaining any advantage singly out of the chaotic conditions resulting from any war or act of aggression.

Now as regards the law of nations as reflected in the Charter of the United Nations, in strict theory, as Kelsen remarks, collective security is the main purpose of the United Nations, and a reading of the relevant provisions in the Charter shows that behind this purpose there is nothing to permit the Big Five to exercise political supremacy over the other members, and even non-members of the United Nations.

The preamble to the Charter of the United Nations sanctifies the salutary principle that armed force shall not be used, save in the common interest. Article I hallows the raison d'etre of the United Nations, viz., that the United Nations shall maintain international peace and security, and to achieve that end shall take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace. The Charter expressly forbids the members of the United Nations from having recourse to any use of force which does not bear the character of collective measure, and, according to Art. 2, paragraph 4, the members have pledged themselves not to resort to the use of force in any manner inconsistent with the purposes of the United Nations. Article 24 provides that in order to ensure prompt and effective action by the United

Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, which according to Art. 25 the members agree in advance to accept and carry out the decisions of the Security Council in accordance with the present Charter. Article 2, paragraph 5, goes to hold that all members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.

The relevant provisions of the Charter, viz., Chapter VI dealing with investigation of disputes and Chapter VII dealing with the provisions for ensuring, maintaining and vouchsafing collective security have been discussed earlier in great detail. Further, Article 51 provides that nothing in the present Charter shall impair the inherent right of the individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by me nbers in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the deems necessary in order to maintain or restore international peace and security.

It is clear from the above discussion that there appears to be no room in the clear provisions of the Charter to allow the Big powers to exercise supremacy over the smaller States who are members of the United Nations, and there is thus no question of revivification of the doctrine of balance of power. For, all actions are to be taken by the United Nations itself, instead of leaving them to the enterprise of the Big Powers. Moreover, the occasions which should give rise to the taking of collective action are based on legal considerations, which make no discrimination between a big and a smaller power whenever there is a breach of the peace or an act of aggression. Such collective measures are to be taken for maintaining or restoring international peace and security and not in the interest of any or all of the big powers.

The United Nations has been successful in realizing the objective of securing collective security in the Korean and the Suez affairs. In the case of the latter the Israeli aggression on Egyptian territory towards the end of October 1956, followed by an Anglo-French invasion of that territory had to be vacated by the United Nations and the peace restored. The U. S. S. R., too, had to respond—though showly—to the strong protests of the world organization against interference in Hungary's internal affairs in October 1956, and invasion of Czechoslovakia in August 1968. Similar was the result in respect of the armed intervention by U. S. A. in the Lebanon and that by Great Britain in Jordan in the middle of July, 1954. Even in the Gongo crisis the United Nations operations, consequent upon civil strife in the country, were carried on, and the United Nations did its best to restore peace to the strife-torn country.

Regional Pacts.—At this stage it will be useful to refer to the various regional pacts which have been sought to be justified by the parties thereto on the ground of world peace. The Charter of the United Nations does not preclude the existence of regional arrangements or agencies for dealing with matters relating to the maintenance of international peace and security which are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations. (Art. 52). The provisions in the Charter are no doubt

innocuous as they envisage regional arrangements in consonance with the purposes and principles of the United Nations; but it seems that somewhat greater emphasis has been placed on limited group agreements than on the parent body for the protection and safeguarding of international peace and security. These groupings have proved to be a revival of the 'balance of power' and relegation of the world organization dedicated to the principle of world-wide collective security to a lower level. They appear to be based on the old Roman adage: "If you want peace be prepared for war." Being apprehensive of these factors President Woodrow Wilson was impelled to remark: "There can be no leagues or alliances, special covenants and understandings within the general and common family of the League of Nations."

This view was discredited by Churchill when in a speech at Foulton in 1946 he propounded "the policy of containment" of communism by means fair or foul. This idea led ultimately to a reversal of the decision of President Woodrow Wilson and the Senate passed a resolution on June 11, 1948, empowering the Administration to favour the progressive development of regional and other collective arrangements. The result is that during the past two decades there has been a mushroom growth of regional pacts created under several treaties among a group of nations. These are discussed below:

1. The North Atlantic Treaty Organization.—It was signed by 12 nations on April 4, 1949, in Washington, the capital of the United States, for a stipulated period of 20 years, with a view to safeguarding the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law. The twelve original members of the NATO were Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom and the United States. Greece and Turkey joined in February 1952. The admission of West Germany was also authorised by the NATO Council on May, 1955, and on May 9 the NATO Council formally admitted the Federal Republic of Germany to membership in NATO.

The preamble of the pact reaffirms the faith of the parties in the purposes and the principles of the Charter of the United Nations and their desire to live in peace with all peoples and all Governments. In the language of the State Department White Paper, "The Atlantic pact is a collective self-defence arrangement among countries of the North Atlantic area who, while banding together to resist armed attack against any one of them, specifically reaffirm their obligations under the Charter to settle their disputes with any nations solely by peaceful means. It is aimed at coordinating the exercise of the right of self-defence specifically recognized in Article 51 of the United Nations Charter. It is designed, therefore, to fit precisely into the framework of the United Nations and to assure practical efforts for maintaining peace and security in harmony with the Charter."

Article 3 provides that in order more effectively to achieve the objectives of the treaty, the parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack. Article 4 provides that the parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the parties is threatened.

The Organization is not a regional arrangement in the true sense of the term, inasmuch as it includes countries which have no geographic regionalism, such as Italy, Greece and Turkey. It is a pact designed to stop Russian 55

expansion westward and in that view is a system of self-defence, or an alliance It is further a system of collective security only with respect to the interna relations of the different States who have formed themselves into an alliancel But, as observes Svarlien, in so far as it is directed against other states and systems of states, it must be considered in the familiar category of military alliances. This has been made clear in Article 5 of the North Atlantic Treaty: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree, that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area." The article, however, provides that any such armed attack and all measures taken as a result thereof would immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

In September 1951, Greece and Turkey were invited to become parties to the North Atlantic Treaty, and became full members of the N. A. T. O. in February 1952. A protocol was added to the original Treaty including the territory of these countries as well as the Mediterranean within the orbit of protection by the North Atlantic Powers. West Germany joined the North Atlantic Treaty on May 9, 1955, raising the membership of N. A. T. O. to 15.

In 1966 France withdraw from the N. A. T. O. and its offices were shifted from there to the territories of adjacent N. A. T. O. members at huge cost.

2. Inter-American Defence Treaty of Reciprocal Assistance or The Rio Pact of 1947.—It is a collective security agreement made under Art. 51 of the Charter for an indefinite period and is known by the name of Inter-American Treaty of Reciprocal Assistance. It was signed at Rio de Janeiro on September 2, 1947. It is open to all American States. The treaty has evolved an Organ of Consultation which takes its decisions by a vote of two-thirds of the signatory States which have ratified the treaty. Article 3 of the Treaty provides that an armed attack against an American State is to be considered as an attack against all the American States and that each one of them undertakes to assist in meeting it in the exercise of inherent right of individual or collective self-defence.

3. Dunkirk Treaty.—Another treaty in the North Atlantic Area is the Dunkirk Treaty or Treaty of Alliance and Mutual Assistance concluded at Dunkirk between France and the United Kingdom on the 4th March, 1947, for a period of 50 years. It provides for all military and other aid and assistance within the power of signatories in case of hostilies with Germany resulting from (a) armed attack by Germany; (b) Germany taking action to facilitate, or adopting a policy of aggression; and (c) enforcement action against Germany taken by the Security Council of the United Nations. It also makes provision

4. The Brussels Treaty, 1948.—The Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence was signed at Brussels on March 17, 1948, the signatories being Great Britain, Belgium, France, Luxembourg and the Netherlands with a view to achieving collective security in Western Europe. The stipulated duration of the treaty is 50 years. Article 4 of the Treaty provides that "if any of the High Contracting Parties should be the

<sup>1.</sup> Svarlien: An Introduction to the Law of Nations, p: 309.

object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the party so attacked all the military and other aid and assistance in their power." The Western Powers have created a Council of Europe consisting of a Committee of Foreign Ministers for the purpose of consultation. In 1954 the Paris Agreements brought Germany and Italy into the Brussels Treaty Organisation, which has been renamed Western European Union. The Old Consultative Council has been replaced by a new Council of Western Europe an Union that functions continuously.

- 5. European Defence Community.—A treaty setting up a European Defence Community composed of six countries, viz., France, West Germany, Italy, the Netherlands, Belgium and Luxembourg was signed on May 27, 1952. Under this arrangement a single European defence force consisting of soliders of all six member nations was to be established with supernational authority and was to join the N. A. T. O. defence force as a single organization. The French Parliament refused to ratify the treaty, with the result that the treaty was abandoned in 1954.
- 6. The ANZUS Pact.—Although in the beginning the United States was averse to a Pacific security pact similar to the North Atlantic Treaty, the development in Asia during 1950 led her to revise the earlier attitude by agreeing to it. The then U.S. President, Mr. Truman, on the 18th April, 1951, made a statement on the proposed security pact between the United States, Australia and New Zealand and said:

"The Governments of Australia and New Zealand have suggested an arrangement between them and the United States, pursuant to Articles 51 and 52 of the United Nations Charter, which would make clear that in the event of an armed attack upon anyone of them in the Pacific, each of the three would act to meet the common danger in accordance with its constitutional processes; and which would establish consultation to strengthen security on the basis of continuous and effective self- help and mutual aid."

The text of the proposed tripartite treaty was agreed upon in June 1951 and published on the 12th July, 1951. It was signed on the 1st September, 1951, at San Francisco.

The Australia-New Zealand-United States of America Security Treaty of September 1, 1951, envisages the constitution of a Council of Foreign Ministers with a view to maintaining a consultative relationship with States, regional organizations, associations of States, or other authorities in the Pacific area for promoting security in the area. The treaty is for an indefinite period subject to withdrawal from the Council by any of the parties on a year's notice.

7. South-East Asia Collective Defence Treaty or Manila Pact.—Inc 1954 Mr. Dulles, the United States Secretary of States, proposed a pacifis regional defence treaty to meet any onslaught of communist drive in Southcat Asia. A conference was held in Manila in September of that year, which was attended by Australia, France, New Zealand, the United Kingdom and the United States, in addition to the three Asian contries, viz., the Philippines, Thailand and Pakistan. The Conference adopted a South-East Asia Collective in defence of any member subjected to attack or of any other area that the members should unanimously agree to include in their common defence line. The treaty embraced within itself the protection of Laos, Cambodia and the non-communist part of Vietnam (i. e., South Vietnam), the three States of Indo-China. The signing by all the delegates of a South-East Asia Collective

Defence Treaty was accompained by (a) a unilateral U. S. declaration in the form of an 'understanding' that the Pact was directed against Communist aggression; (b) a Protocol on Indo-China; and (c) a general Statement of principles by the eight signatories in the form of a "Pacific Charter". This pact is a defensive alliance without any combined military force like that of NATO. The stipulated duration of the treaty is indefinite, but, subject to one year's notice, any party may withdraw from the Council.

As already noticed, the treaty mentioned South Vietnam, Laos and Cambodia as the likely areas where the contracting parties would act collectively to thwart the apprehended aggression. It is the very question of the defence of South Vietnam which has brought about the fissures in it. France and Pakistan have now made reservations about the need for military action for the defence of South Vietnam. Pakistan which got into SEATO as subsequent events have shown not for fighting Communism as such, but for strengthening itself by any means, has recently evolved a degree of relationship with Communist China. This has radically changed the outlook of Pakistan on the problem of war and peace in Southeast Asia.

In the period of its existence the Pact, though originally styled as an exclusively military alliance, has made a considerable impact on the conmilitary development of its less fortunate members—Thailand, the Philippines and Pakistan specifically. In spite of its internal weakness—the USA having received no help from any other member of the organisation including Britain, with the solitary exception of Australia, in its fight for the defence of South Vietnam—and external posture, the SEATO can still play a defensive role in a wider sense of the world.

On November 8, 1972, Pakistan formally announced withdrawal from South-East Asia Treaty Organization (SEATO). The notice of withdrawal would become effective after one year. Pakistan began losing interest in the alliance as it developed close ties with China. Coolness towards the military grouping was reflected in its staying away from SEATO council meetings. With the loss of Bangladesh, Pakistan ceased to have a geographical stake in South-East Asia.

8. U. S.-Japanese Defence Pact.—A treaty between the United States and Japan was concluded on the 8th September, 1951, for an indefinite duration and provides for aid to Japan in case of any armed attack on Japan from without including large scale riots and disturbance in Japan cause through instigation or intervention by outside power or powers. Under the treaty U.S.A. is entitled to dispose land, air and sea forces in and about Japan, for use in case of any of the contingencies mentioned above and generally for the maintenance of peace and security in the Far East. Japan is not to grant, without prior approval of the United States, bases, rights of garrison or transit to any third Power. The United States and Japan signed a new 10-year treaty on the 19th January, 1960, stipulating that an attack on either party on Japanese territory would be met by both. The new treaty also granted to the United State the rights to occupy military bases in Japan.

9. Balkan Pact.—The treaty between Greece, Turkey and Yugoslavia was concluded on the 9th September, 1954, for a stipulated period of 20 years, and provided for military and other assistance in case of armed aggression

against one or more signatories.

10. Treaty of Friend-hip between France and Libya.—In the region of North Africa a treaty of friendship was concluded between France and Libya on the 10th August, 1955, providing all millitary and other assistance in case of war or threat of war in the area. The treaty envisages provisions for certain

concessions to France. The duration of the treaty is 20 years, but the treaty is to be reviewed after 10 years.

- 11. Egypt-Syria Defence Pact.—The pact was concluded on the 20th October, 1955, for a duration of five years. It provides for all military and other assistance in case of armed attack. A Supreme Council consisting of Foreign and Defence Ministers of the two Governments has been constituted, with a war council consisting of the two Chiefs of Staff, being a consultative body to the Supreme Council. It provides for a joint command comprising all available armed forces.
- 12. The Soviet System of Collective Security.—The communist countries have also entered into a series of bilateral treaties as distinguished from the western system of multilateral agreements. The Soviet Union is thus bound by treaties of mutual assistance with almost all the communist countries, e. g., Yugoslavia, Poland, Rumania, Czechoslovakia, Hungary, Bulgaria and Finland, and these countries themselves are linked inter se by pacts of mutual help. "These bilateral agreements," observes Svarlien, "not only involve the Soviet Union and her satellites directly, by establishing the lines that lead to Moscow, but these lines are crossed, like a spider's web, by similar treaties linking inter se the 'people's democracies."
- 13. Treaty of Friendship, Alliance and Mutual Assistance.—The treaty was concluded between the U.S.S.R. and the Central People's Government of China on the 14th February, 1950, for a period of 30 years. It envisages full military and other assistance in case of an armed attack by Japan or by any State allied with Japan.
- 14. Warsaw Treaty or East European Treaty Organization .-- A conference on the safeguarding of peace and collective security in Europe was held in Moscow in November-December, 1954. Invitations to the conference were issued to 23 European countries, as well as to the United States. Only the Communist States of Eastern Europe, viz., Poland, the German Democratic Republic (Eastern Germany), Czechoslovakia, Hungary, Rumania, Bulgaria and Albania accepted the invitations. The People's Republic of China was represented by an observer. The eight countries subsequently held a three-day conference in Warsaw on May 11-13, 1955, with the result that an East European Treaty Organization formarly came into being in Warsaw on May 14, 1955, with the conclusion of a Treaty of Friendship, Co-operation and Mutual Assistance by eight European nations supported by the People's Republic of China for a period of 20 years. Its members are Albania, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, Rumania and U. S. S. R. Under Art. 4 of the treaty in the event of armed attack in Europe on one or more of the parties to the Treaty by any State or group of States, each of the parties to the Treaty in the exercise of its right to individual or collective self-defence in accordance with Art. 51 of the Charter of the United Nations Organization, should immediately, either individually or in agreement with other parties to the Treaty, come to the assistance of the State or States attacked with all such means as it deems necessary, including armed force. The parties to the Treaty should immediately consult concerning the necessary measures to be taken by them jointly in order to restore and maintain international peace and security. Measures taken on the basis of this article shall be reported to the Security Council in conformity with the provisions of the Charter of the United Nations

<sup>1.</sup> Svarlien : An Introduction to the Law of Nations, p. 318.

Organization. These measures shall be discontinued immediately the Security Council adopts the necessary measures to restore and maintain international peace and security.

The Treaty provides for a joint command of the armed forces of the State signatories of the Treaty. The unified military command for the armed forces of the eight countries would have its headquarters in Moscow and would be headed by Marshal of the Soviet Union, I. S. Koniev. The defience ministers or other military leaders of the signatory countries were appointed Deputy Commanders-in-Chief and given command of the armed forces assigned to the unified armed forces by each respective signatory country.

The preamble, while reaffirming the desire of the contracting parties to establish a system of collective security in Europe based on the participation of all European States, affirms their conviction of the necessity of taking measures to safeguard their security and maintain peace in Europe in view of the ratification of the Paris agreements envisaging the formation of Western European Union and remilitarization of Western Germany.

- 15. U. S.-Philippines Mutual Defence Treaty.—The treaty between U.S.A. and Philippines was concluded on the 30th August, 1951, and provides for mutual aid in case of armed attack in the pacific area on any of the parties. The treaty is for an indefinite period.
- 16. Arab League.—It is an association of Arab States formed on the 22nd March, 1945, for an indefinite period. Its object is to maintain Arab solidiarity. The Leage members are Egypt, Iraq, Jordan, Saudi Arabia, Syria, Lebanon, Yemen and Libya. It is a regional system which has been organized for the purpose of economic and cultural co-operation as also for collective self-defence. It does not affect any of the rights and obligations devolving upon the contracting States under the Charter of the United Nations.

The United Arab Republic, Syria, Libya and Sudan entered into a military pact towards the end of 1970 to weld their armies under a unified joint high command.

17. Baghdad Pact (Central Treaty Organization).—It is a pact to bring about security to the Middle East region. The pact was concluded on the 24th February, 1950, with Iraq, Turkey, U. K., Pakistan-though she does not by any stretch of imagination belong to the Middle East-and Iran as its members, the biggest and most powerful member being the United Kingdom. The United States of America, although not a full-fledged member, is on the military committee of the Baghdad pact. The duration of the treaty is five years, but it is renewable. It provides for mutual military assistance in case of armed aggression or threat thereof against one or more of the contracting parties. It was designed to eschew the influence of the Soviet Union from this region, but the pact has served to invite the Soviet Union to take greater interest in the Middle East and has been one of the major reasons for countries of West Asia falling at among themselves. opposed the pact on the ground that defence of the Arab world should emanate from the Arab collective security pact without the participation of Big Powers and that the Arabs should not accept any alliance outside the scope of the collective security pact. Egypt asserted that the Baghdad pact had virtually made Iraq a colony of Britain and a part of the British area of influence.

The Soviet Government protested against Iran's accession to the Bagh-

dad Pact and regretted that Iran had decided to join the Baghdad Pact despite the friendly and repeated warnings of the Soviet Union.

Iraq was proclaimed a Republic in the middle of July 1958, and the 30-year old regime of General Nuri-al-Said was overthrown. Iraq renounced U. S. military aid on the 1st June, 1959, and cancelled a supplemental agreement signed in 1955 on the disposal of surplus military equipment, and a 1957-agreement under which the United States had agreed to provide assistance to Baghdad Pact countries to help establish a tele-communications network. Iraq declared to have scrapped her dangerous agreements with the United States in an attempt to disentangle herself from international complications, these agreements being incompatible with the policy of the Iraq Government which desired to establish her international relations on new foundations based on friendship and mutual benefits.

The name Baghdad Pact was changed to Central Treaty Organization in view of the withdrawal of Iraq from the Pact. The change was approved by

the member countries in August 1959.

18. Agreements for Military Aid between U.S.A. and Turkey, Iran and Pakistan.-Besides NATO, SEATO, ANZUS and multilateral military alliances, U. S. A. also leads a system of bilateral pacts providing for mutual assistance between the signatories in each case, viz., the United States and the nation concerned. The United States has entred into such bilateral pacts with Nationalist China, Korea, Japan, the Philippines and Pakistan.

A meeting of the Baghdad Pact Council was held in London on the 29th July, 1959, soon after the revolution in Iraq. At this meeting a Declaration was issued on behalf of the Prime Ministers of Iran, Pakistan, Turkey and the United Kingdom and Mr. John Foster Dulles, Secretary of State, U. S. A., which while recalling that Art. I of the Pact of Mutual Co-operation signed at Baghdad on the 24th February, 1955, provides that the parties will co-operate for their security and defence and that such measures as they agree to give effect to this co-operation may form the subject of special agreements, embodied an assurance by the United States that, in the interest of world peace and pursuant to existing Congressional authorization, she agreed to coperate with the nations making the Declaation for their security and defence and that she will promptly enter into agreements designed to give effect to this co-operation. In pursuance of this undertaking given on behalf of the U.S.A. consultations took place at Ankara early in March 1959, and three agreements were signed on the 5th March, 1959, between the U.S.A. on the one hand and Turkey, Iran and Pakistan on the other. These three governments signed on the 5th March, 1959, were identical.

Under the latest agreement signed between the United States of America and l'akistan, the Government of United States have undertaken that they will not only continue to give economic and military assistance to Pakistan, but will also, on request, use the armed forces of the United States in order to assist the Government of Pakistan, in case of armed aggression against Pakistan

from any country controlled by international Communism.

Indo-Soviet Friendship Treaty, 1971.—On August 9, 1971, India and the Soviet Union signed a twenty-year friendship treaty, whereby each of the contracting parties declared that it shall not enter into or participate in any military alliance directed against the other party and that in the event of either party being subjected to an attack or a threat from a third party, the high contracting parties shall immediately enter into mutual consultations in

order to remove such threat and to take appropriate effective mersures to ensure peace and the security of their countries.

The international situation which formed the backdrop to this treaty was surcharged with fear, tension and political blackmail. Pakistan was having a bloodbath in Bangladesh. The treaty seemed to have achieved the desired effect.

20. India-Bangladesh Treaty, 1972.—On March 19, 1972, India and Bangladesh signed a 25 year Treaty of Friendship, Cooperation and Peace on the lines of the Indo-Soviet Treaty of 1971.

## Economic and Political Co-operation

- 21. Benelux.—Attempts to fortify the peace by economic and political co-operation were made by entering into an economic agreement between Belegium, the Netherlands and Luxembourg, known as Benelux. The agreement was signed in 1944 by the governments in exile in London, with a view to creating a customs union, doing away with tariffs among the member States and setting up a single tariffs wall to protect them against imports from the outside. The tariffs among the member States were abolished on January 1, 1948. A new agreement was signed in 1947 by the Benelux States to work toward a full economic union.
- 22. Organization for European Economic Co-operation.—The Organization for European Economic Co-operation (OEEC) was established in 1948 for co-ordinating the work of the European States in operating the Marshall Plan. An important offshoot of OEEC is the European Payments Union (EPU) for entangling exchange problems. The EPU is financed out of Marshall Plan funds.
- 23. The Organization of American States.—The Organization of American States (OAS) was established at a meeting at Bagota in 1948, when the Pan American Union—the headquarters staff of an organization of the American Republics for the promotion of commerce—as its secretarial body. The OAS provides technical services to the members in economic, legal and cultural fields. It has a number of specialized organizations affiliated with it. These organizations are co-ordinated by the Pan American Union and co-operate with the corresponding agencies of the United Nations.
- The Schuman Plan or the European Coal and Steel Community. -On May 9, 1950, the French Foreign Minister Robert Schuman proposed a plan envisaging united political control over the steel and coal industries of Europe on the assumptions that agreement between basic industries with respect to transnational policies was a prerequisite to the removal of trade barriers and that regional economic integration in Europe could not be possible without the inclusion of Western Germany. The treaty establishing the European Coal and Steel Community was signed on April 18, 1951, in Paris by France, the Federal Republic of Germany, Itlay, Belgium, the Netherlands, and Luxembourg. The Community is equipped with a real government, consisting of a Council of Ministers—one Minister from each participating State—a High Authority of nine members, a Consultative Committee, an Assembly of 78 representatives of the national parliaments and a Court of Justice to adjudicate controversies arising in connection with the operation of any agency of the Coal and Steel Community. The Community is a true federal government, having common markets for coal, iron ore, scrap The treaty is to operate for 50 years and aims at an economic integration of Europe.

25. European Economic Community.—In November 1969, the leaders of European Economic Community agreed to open membership negotiations with Britain, Denmark, Eire and Norway. Norway, however, subsequently did not join.

On July 22, 1972, a free trade area embracing 300 million people in Western Europe came into being when leaders of six other West European countries signed agreements with the countries of the European Common Market, thereby creating the most powerful commercial bloc the world has ever seen. The treaties came into effect from January 1, 1973.

During October 1972, the nine members of the European Economic Community met at Paris to decide the future course of action. The meeting took the decision to transform before the end of the decade the whole complex of their relations into a European Union. The idea was to achieve a European political union by 1980. It was also agreed at the meeting that a European co-operation monetary fund would be set up in April 1973 with a reserve of 1.4 billion dollars and it would be used as short-term credit to support the fluctuations in currencies of member countries. The European monetary fund is expected to tackle long-term currency support on a community basis and establish a European unit of account as a reserve currency in the Community's trade with the rest of the world.

26. The Colombo Plan.— It is a regional agreement of some important countries in Asia having a technical assistance programme combining the efforts of British Commonwealth members. It works in co-operation with the Technical Assistance programme of the United Nations.

The Colombo Plan was Lorn at a meeting of ministerial representatives of Commonwealth of Nations Governments in Colombo in January 1950. Although the original participants in the Plan were Commonwealth countries, yet it was never intended that it should be an exclusively Commonwealth venture. The United States joined in 1951, and other countries such as Burma, Cambodia, Indenesia, Japan, Laos, Nepal, the Philippines, Thailand and the Viet Nam fellowed later. With the admission of Bangladesh and Fiji to the Colombo Plan on November 6, 1972, its membership has now increased to 26.

The main idea of the Plan is that the countries of South and South-East Asia will make maximum efforts towards their own development while advanced countries will supplement their efforts by providing such assistance as they are in a position to render.

The assistance rendered by the Plan is of two kinds: (i) financial and (ii) technical.

Conclusion.—The tragedics in Egypt caused by the invasion of Israel and Anglo-French forces, in Hungary by the Soviet forces and in Czechoslovakia by Soviet Union and other Warsaw Pact Powers in August 1968, have clearly established the futility of military alliances and pacts. Public opinion became so vehement that each of the aggressor countries in the aforesaid cases had to retrace its steps. Similar was the result in respect of armed into vention by U. S. A. in the Lebanon and that by Great Britain in Jordan in the middle of July 1958. The world opinion chiefly represented in the United Nations Assembly and elsewhere, observed Pt. Nehru in his address to the U. N. Assembly at New York on December 20, 1956, is an important factor which in future will probably deter or make more difficult any such aberrations from the path of rectitude by any nation, and every country, weak or strong, will have to think twice before it does something which enrages world opinion. He continued that it is India's objective, as it must be of any

reasonable person, that we must have peace. Then it followed necessarily that we must not have cold war. If we must not have cold war then it followed necessarily that we must not buttress our idea of peace by past military establishments and pacts and alliances.

The cold war resulted in the great armed blocs of nations, each calling itself a defensive bloc afraid of the other. Any such defensive pact tended to produce the result of an offensive pact in the minds of other countries engulfing both the blocs in a vicious circle.

The military and political alliances formed in the post-war Europe have, however, lost much of their relevance with the virtual end of the cold war. The cold war is now globally dead; it only exists between the U. S. S. R. and China. The old dividing lines of ideology have disappeared. The United States of America, the erstwhile leader of the cold war against communism, is now a friend of the two great communist powers, and the two great communist powers have themselves fallen out among themselves. Japan and China have ushered in a new era in their relationship. The bi powers in their own individual and collective interest have instead attempted to contrive balances and to carve out spheres of influence with a view to dominating the developing countries by exploiting their economic weakness.

This interlocking of nations in military ties has had such a tremendous entanglement that clear thinking and clear action had given place to military grouping which had the tendency of preserving and re-establishing the colonial dependence of countries.

The smaller nations are apprehensive of Great Powers discussing security matters in special conferences outside the ambit of the U. N. There is valid comment that Great Powers are by-passing the U. N. in regotiating military alliances. Regional pacts as a rule should aim to discuss problems common to a particular region and not include powers who are alien to geographic regionalism. The economic pacts discussed above for increasing the level of living and promoting human welfare are in the right direction and deserve encouragement.

The need of the much-tormented world is to put faith in the Panch Shila so sincerely sponsored by Prime Minister Nehru, the principles embodied being mutual respect for each other's territorial integrity and sovereignly, non-aggression, non-interference in each other's internal affairs, equality and mutual benefit and peaceful co-existence. Pacts and alliances on the lines of NATO, Soviet system of Collective Security, U. S. Military Aid Pact with Pakistan or the Baghdad Pact are not the harbinger of peace but are calculated to sow the seeds of war.

## CHAPTER XXXV DISARMAMENT

The problem of disarmament has assumed great importance on account of the discovery of new weapons of warfare capable of causing wanton destruction and indiscriminate assassination, to the extent of complete annihilation of mankind through thermonuclear explosions. The task, which is actively engaging the attention of leading statesmen of the world, is to find out ways and means to save succeeding generations from the scourge of war.

The idea of international control and reduction of military forces was earlier mooted at a Peace Conference convened by the Czar of Russia in the year 1899. A committee of experts appointed under the aegis of the Peace Conference reported failure in its efforts to reach an agreement on the reduction of armies and navies. Another Peace Conference convened in 1907 also failed to arrive at any agreement on reduction of arms.

League of Nations.—The First World War brought to the fore the urgent need of achieving disarmament. Article 8 of the Covenant of the League recognised that the maintenance of peace required the reduction of national armaments to the lowest point consistent with national safety. The League Council was required to formulate plans for such reduction for the consideration and action of the several Governments. The members of the League undertook to interchange full and frank information as to the scale of their armaments, their military, naval and air programmes and the condition of such of their industries as were adaptable to warlike purposes. A Commission was to be constituted to advise the Council on execution of the required agreements.

A Commission appointed in 1921 laid down the principles that no plan could work unless every nation joined and that the nations must help any country that might be attacked. Those principles were accepted by the League Assembly in 1922 and the draft of a proposed treaty of mutual assistance was prepared in 1923 on the basis of full disclosure of military secrets, universality of membership, collective security, etc. It was difficult for the nations of Europe to agree on such on ambitious plan contained in the draft treaty.

Geneva Conference.—In 1932 a Conference of sixty-one nations met at Geneva which agreed on prohibition of certain weapons such as bombs of international supervision of the arms business and of publicity of arms budgets. The different nations, however, failed to implement their agreement into action.

The League gave up its effort to promote disarmament when it found that Germany was making frantic efforts for rearmament.

United Nations.—Disarmament talks started in right earnest after the conclusion of the Second World War, both within and outside the United Nations. Article 26 of the Charter of the United Nations has authorised the Security Council to formulate plans to be submitted to the members of the United Nations for the establishment of a system, for the regulation of armaments. The discovery of atom bombs soon after the signing of the

Charter and just before the conclusion of the Second World War gave added importance to the question of disarmament.

Atomic Energy Commission.—The United Nations General Assembly adopted on January 24, 1946, a resolution establishing a Commission on Atomic Energy for making proposals for the control of peaceful purposes and for effective safeguards by way protect the violations and evasions on the part of the report on December 13, the Commission stated that an effective system of control of atomic energy must be international and established by an enforceable multilateral treaty or convention which, in turn, must be administered and operated by an international organ or agency within the United Nations. In February 1947 the Soviet delegate proposed certain amendments to the Commission's report in the Security Council by suggesting that the control and inspection should begin immediately upon the ratification of the proposed treaty, that atomic weapons in existence be destroyed and that the enforcement of the controls should be subject to the veto.

On September 11, 1947, the Commission submitted its second report to to the Security Council and outlined specific proposals on the functions and powers of an international agency for the control of atomic energy which expressed the following basic principles:

- (i) Decisions concerning the production and use of atomic energy should not be left in the hands of nations.
- (ii) Policies concerning the production and use of atomic energy which substantially affect world security should be governed by principles established in the treaty or convention which the agency would be obligated to carry out.
- (iii) Nations must undertake in the treaty or convention to grant the agency rights of inspection of any part of their territory, subject to appropriate procedural requirements and limitations.

The Atomic Energy Commission was reconvened on February 18, 1949, but the U. S. S. R. proposed that the Commission begin immediately the preparation of the two draft conventions, one on the prohibition of atomic weapons and the other on control of atomic energy. The Commission concluded on July 29, 1949, that no useful purpose could be served by further discussions in the Commission and that there was an impasse which could not be resolved until the permanent members reported that a basis for agreement existed. The Commission's conclusions were transmitted to the Assembly.

In September 1953, the U. S. S. R. reintroduced in the United Nations General Assembly a proposal for the unconditional prohibition of atomic weapons but the same was rejected by the Political Committee.

Regulation and Reduction of Armaments.—On December 14, 1946, the General Assembly recommended that the Security Council consider essential practical measures for an early general regulation and reduction of armaments and armed forces. The Assembly also recommended that the Security Council accelerate measures to have armed forces placed, at its disposal as provided for in Article 43 of the Charter. In pursuance of the above the Security Council set up a Commission for Conventional Armaments on February 13, 1947. On August 12, 1948, the Commission approved two resolutions. The first resolution suggested that weapons of mass destruction

should be defined to include atomic explosive weapons, radio-active material weapons, lethal, chemical and biological weapons. The second resolution embodied the following general principles to govern the regulation and reduction of armaments and armed forces:

- (1) a system for the regulation and reduction of armaments and armed forces should embrace all States;
- (2) to put such a system into effect, there must be international confidence and security, but the regulation and reduction of armaments and the existence of confidence are reciprocal;
- (3) the conditions essential to international confidence and security include an adequate system of agreements under Art. 43 of the Charter, an effective control of atomic energy, and the conclusion of peace settlements with Germany and Japan;
- (4) to conform with article 26 of the Charter, armaments and armed forces under such a system must be limited to those consistent with and indispensable to the maintenance of international peace and security and must not exceed those necessary for the implementation of Members' obligations and the protection of their rights under the Charter;
- (5) to ensure observance, such a system must include adequate safeguards including an agreed system of international supervision;
- (6) provision must be made for effective enforcement in the event of violation.

The General Assembly resolved on November 19, 1948, that the Security Council pursue its study of regulating and reducing conventional armaments and armed forces through the Commission for Conventional Armaments. The Commission was asked to devote its first attention to formulating proposals for an international organ of control, operating within the framework of the Security Council.

On December 5, 1949, the Assembly approved the Commission's proposals on the submission and verification of full information from member States on their conventional armaments and armed forces.

At the fifth session of the General Assembly in 1950, the Korean war was in progress and armaments were being piled up as a "defensive measure." The Assembly adopted a resolution calling for prompt action against aggression and established a Committee of Twelve to consider and report to the next session on ways and means whereby the work of the Atomic Energy Commission and the Commission for Conventional Armaments might be coordinated and on the advisability of their functions being merged and placed under a new and consolidated disarmaments commission.

The Committee of Twelve recommended to the Sixth Assembly on September 28, 1951, that a new Disarmament Commission be established to carry forward the tasks assigned to the two Commissions and that the two Commissions be dissolved on the establishment of the new Commission.

The five nation sub-committee of the U.N. Disarmament Commission, set up by an Assembly resolution of 1953, started its meeting again in London in March, 1957. On June 14, 1957, the Soviet delegate to the five-power United Nations disarmament sub-committee made a three-point proposal in London. These were: (i) the cesssation of all tests for a period

of two or three years; (ii) the setting up of an international commission to observe the implementation of the cessation of tests, and to make reports to the Security Council and General Assembly; and (iii) control posts, suitably equipped with scientific apparatus, to be set up in the United States, U. S.S.R., the United Kingdom and the Pacific area for the observation of a cessation agreement.

In a white paper on the disarmament talks between the United States, Soviet Union, Britain, France and Canada the British Government declared on July 17, 1957, that substantial advances had been made in the four months of negotiations in London. It indicated how all delegates to the sub-committee accepted the idea of working not for a comprehensive disarmament plan, but for a partial agreement. It said that the West and the Soviet Union had reached general agreement on the following:

- 1. That the United States and Soviet Union should each initially reduce the manpower in their forces to 2,500,000, while Britain and France would each observe a maximum ceiling of 7,50,000.
- 2. During the first stage, while these reductions were being made, all States should also reduce their arms by exchanging lists of armaments to be kept in depots under supervision of an international control organ.
  - 3. That there should be some reduction in military budgets.
- 4. That there should be some system of inspection to safeguard against surprise attack, both by means of aerial photographic survey and by use of ground observations post.
- All appeared to agree on the need for a partial rather than a comprehensive disarmament agreement.

There yet seemed no agreement, the white paper added, on how to suspend nuclear tests or how to achieve nuclear disarmament.

On October 27, 1957, the Soviet Foreign Minister, Andre Gromyko, in a letter to the United Nations Secretary-General, Mr. Hammarskjoeld, committee which handled the protracted East-West disarmament negotiations commission be set up composed of al. United Nations member States. That would replace the existing disarmament commission composed of the ll Britain, France, the United States, Canada and its sub-committee, viz., proposed disarmament commission would open sessions.

By the end of 1957 the disarmament negotiations had resulted in tentative agreement with regard to the principle that any suspension of nuclear tests should be subject to international inspection and that aerial and ground inspection should be regarded as a means of protection against surprise attack. But no agreement could be reached with regard to the cut-off in the production of fissile material for nuclear weapons, reduction of existing military stocks of fissile material after the cut-off, exchange of information on The Soviet Government pleaded for an absolute ban on the use of nuclear weapons, for the elimination of nuclear weapons altogether, for the elimination of foreign military bases and for reduction of the forces of the four major Powers stationed in Germany and in the North Atlantic Treaty Organization and Warsaw Pact areas.

- Rapacki Plan.—On the 14th February, 1958, the Polish Minister of Foreign Affairs, Adam Rapacki, put forward detailed Polish proposals for a nuclear-free zone in Central Europe in continuation of the proposals which he had first presented on the 2nd October, 1957, to the General Assembly of the United Nations. The proposals were as under:
- I. The de-nuclearised zone in Central Europe should include the territory of Poland, Czechoslovakia, German Democratic Republic and German Federal Republic. In this territory nuclear weapons would neither be manufactured nor stock-piled. The equipment and installations designed for their servicing would not be located there.
- II. The contents of the obligations arising from the establishment of the denuclearised zone would be based on the following premises:
- (1) The States included in this zone would undertake the obligation neither to manufacture, maintain nor import for their own use and not to permit the location on their territories of nuclear weapons of any type as well as not to instal on or admit to their territories of installations and equipment designed for servicing nuclear weapons including missile launching equipment.
- (2' The four Powers, France, the United States, Great Britain and the U. S. S. R., would undertake the obligations not to maintain nuclear weapons in the armaments of their forces stationed on the territories of states included in this zone and not to transfer in any manner and under any reason whatsoever nuclear weapons for installations and equipment designed for servicing nuclear weapons to governments or to other organs in this area.
- (3) The powers which have at their disposal nuclear weapons should undertake the obligation not to use these weapons against the territory of the zone or against any targets situated in this zone.
- (4) Other states whose forces are stationed on the territory of any State included in the zone would also undertake the obligation not to maintain nuclear weapons in the armaments of these forces and not to transfer such weapons to governments or to other bodies in the area.
- III. In order to ensure the effectiveness and the implementation of the obligations contained in part II, paras. 1, 2 and 4, the states concerned would undertake to create a system of broad and effective control in the area of the proposed zone and submit themselves to its functions. The system could include ground as well as aerial control. For the purpose of supervising the implementation of the proposed obligations an adequate control machinery should be established. There could participate in it for example representatives appointed, not excluding ad personam appointments by organs of the North Atlantic Treaty Organisation and of the Warsaw Treaty nationals, or representatives of states which do not belong to any military grouping in Europe could also participate in it.

The most simple form embodying the obligations of states included in the zone would, be the conclusion of an appropriate international convention. To avoid however, complications which some states might find in such a solution it could be arranged that:

 These obligations be embodied in the form of four unilateral declarations bearing the character of an international obligation deposited with a mutually agreed upon depository state.

- (2) The obligations of Great Powers be embodied in the form of a mutual document or unilateral declarations, as mentioned above in para. 1.
- (3) The obligations of other states whose armed forces are stationed in the area of the zone be embodied in the form of unilateral declarations as mentioned in para. 1.

On the basis of the above proposals the Government of the Polish l'cople's Republic suggested to initiate negotiations for the purpose of a further detailed elaboration of the plan for the establishment of the denuclearised zone, of the documents and guarantees related to it as well as of the means of implementation of the undertaken obligations.

The NATO Supreme Commander in Europe General Norstad opposed the creation of a nuclear-free zone in Central Europe as that would endanger NATO strategy and the defence of Western Europe. The plan was rejected by Britain, the U. S. A. and France as well as by the other NATO countries. The U. S. S. R. Government, however, supported the establishment of an atom free zone in Central Europe. The Governments of the Czechoslovak Republic and the German Democratic Republic also welcomed the Polish proposal.

Revised Rapacki Plan.—In order to meet the objections raised against the proposals made on the 14th February, 1958, the Polish Foreign Minister introduced a number of changes in his earlier plan in November 1958. He observed that, in accordance with these changes which had been agreed to by the other Warsaw Treaty countries, they were prepared to consider the implementation of the Polish plan in two stages. In the first stage a ban would be introduced on the production of nuclear weapons in the territories of Poland, Czechoslovakia, the German Democratic Republic, and the German Federal Republic. An obligation would also be undertaken within the proposed zone to renounce the equipment with nuclear weapons of armies which did not yet possess them. At the same time, appropriate measures of control would be introduced. This might be said to amount to freezing nuclear armaments in the proposed zone.

The implementation of the second stage, according to the revised plan, would be preceded by talks on the reduction of conventional forces. That reduction would be effected simultaneously with the complete de-nuclearization of the zone, and would be accompanied by appropriate measures of control.

The Polish Foreign Minister M. Rapacki envisaged a conference on the plan where an agreement could be reached by the parties concerned. He regarded as the parties directly concerned to be (i) the four countries in the proposed de-nuclearized zone, viz., Poland, Czechoslovakia, Eastern Germany and Western Germany; and (ii) the four Great Powers, viz., Britain, France, the Soviet Union and the U.S.A.; and (ii) those other countries which maintained armed forces on German territory, viz., Belgium, Canada and Denmark.

International zone of inspection in Arctic.—At a meeting of the Security (ouncil, the Soviet delegate presented a resolution on the 21st April, 1958, calling upon the United States to refrain from directing its military aircraft, armed with atomic and hydrogen bombs, towards the frontiers of other States with a view to creating a threat to their security or of military demonstrations. That resolution was however eventually withdrawn.

On the 27th April, 1958, the U. S. delegate moved a resolution proposing the establishment of an international zone of inspection in the Arctic to safeguard against the possibility of a surprise attack. This proposal was supported by all members of the Security Council (excepting the U. S. S. R.) and the Secretary-General, Dr. Hammarskjoeld, who urged its acceptance as an important step towards the relaxation of international tension, but it was negatived by the Soviet veto.

Geneva Conference on detection of nuclear weapon tests .- On the proposal of President Eisenhower to Premier Khrushchev a conference of technical experts to study ways of supervising a ban on nuclear weapons tests met in Geneva in July 1958. The report made a number of recommendations for consideration by the Governments concerned.

Geneva Conference on Suspension of Nuclear Tests.—In consequence of the deliberations of the conference of experts, a conference on suspension of nuclear tests comprising the delegates from the U.S., Britain and Soviet Russia opened in Geneva on the 31st October. The U.N. General Assembly adopted a resolution on the 4th November calling for the suspension of nuclear tests during the Geneva conference. All the three delegations stuck to their previous views-the Soviet Union sought a three-power agreement for the cessation of tests for all time and establishment of a control system proposed by experts, while the U.S. A. and Great Britain called for an initial suspension of tests on a year-to-year basis, the establishment of an effective inspection system and progress towards an overall disarmament. The conference could not agree on the voting procedure in the Control Commission, manning of control posts and inspection teams.

The conference of experts convened in Geneva in November 1958 on measures to prevent surprise attacks remained deadlocked and had to be suspended sine die in December.

Nuclear Test Ban Treaty, 1963. - The partial nuclear test ban treaty signed by the Governments of the United States of America, Great Britain, the Union of Soviet Socialist Republics and other countries was described by President Kennedy as a shaft of light cut into the darkness of the East-West cold war. It has been an important step in the history of international co-operation and understanding. Though the test ban is of a limited character the fact that it has been initialled is bound to generate an amount of goodwill and understanding which may lead to a complete test ban. Credit is due to all the three big powers, viz; U. S. A., Great Britain and the U. S. S. R. for the sanity with which they approached the task.

The relevant provisions of the treaty are as follows :-

The Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics hereinafter referred to as the original parties, proclaiming as their principal aim the speediest possible achievement of an agreement on general and complete disarmament under strict international control, in accordance with the objectives of the United Nations which would put an end to the armaments race and eliminate the incentive to the production and testing of all kinds of weapons, including nuclear weapons, seeking to achieve the discontinuance of all test explosions of nuclear weapons for all time, determined to continue negotiations, and desiring to put an end to the contamination of man's environment by radioactive substances, have agreed as follows:

Arricle I .- (1) Each of the parties to this treaty undertakes to prohibit,

to prevent, and not to carry out any nuclear weapons test explosion, or any other nuclear explosion at any place under its jurisdiction or control:

- (a) In the atmosphere, beyond its limits, including outer space, or under water, including territorial waters or high seas; or
- (b) In any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted.

It is understood in this connection that the provisions of this subparagraph are without prejudice to the conclusion of a treaty reuslting in the permanent banning of all nuclear test explosions, including such explosions underground, the conclusion of which, as the parties have stated in the preamble to this treaty, they seek to achieve.

(2) Each of the parties to this treaty undertakes furthermore to refrain from causing, encouraging, or in any way participating in the carrying out of any nuclear weapons test explosion, or any other nuclear explosion anywhere which would take place in any of the environments described, or have the effect referred to in paragraph one of this article.

Article II.—(1) Any party may propose amendments to this treaty. The text of any proposed amendment shall be submitted to the depository Governments, viz., the U.S.A., Great Britain and the U.S.S.R., which shall one-third or more of the parties, the depository Governments of the parties, the depository Governments shall convene a conference, to which they shall invite all the parties, to consider such amendment.

(2) Any amendment to this treaty must be approved, by a majority of the votes of all the parties to this treaty, including the votes of all original parties. The amendment shall enter into force for all the parties upon the deposit of instruments of ratification by a majority of all the parties, including the instrudments of ratification of all the original parties.

Article III.—(1) This treaty shall be open to all States for signature. Any state which does not sign this treaty before its entry into force in accorance with paragraph (3) of this article may accede to it at any time.

(2) The treaty shall be subject to ratification by signatory States.

(3) This treaty shall enter into force after its ratification by all the original parties and the deposit of their instruments of ratification.

This treaty shall be registered by the depository Governments pursuant to Article 102 of the Charter of the United Nations.

Article IV.—This treaty shall be of unlimited duration. Each party shall, in exercising its national sovereignty, have the right to withdraw from the treaty, if it decides that extraordinary events, related to the subject matter of this treaty, have jeopardised the supreme interests of its country. It shall give notice of such withdrawal to all other parties to the treaty three months in advance.

The treaty came into force on October 10, 1963. It was originally signed by the Big Three Powers in Moscow on August 5, 1963. Nearly a hundred countries had signed the treaty when it came into effect in October 1963. China, France and Albania have, however, not signed the partial nuclear test ban treaty.

The Moscow Test Ban Treaty and the agreement on reduction of fissionable materials output for nuclear weapons, announced by the Soviet Union and the United States in 1964, marked the first steps on the path to disarmament.

China and France have not only refused to sign the treaty but have conducted many nuclear tests from time to time in defiance of various U. N. resolutions and world opinion. Deep concern and anxiety have been expressed at the contamination being brought about by continuing atmospheric nuclear testing by China and France in violation of the partial Nuclear Test Ban Treaty.

Nuclear Non-Proliferation Treaty, 1968.—On June 12, 1968, the United Nations General Assembly commended by 95 votes against 5 with 21 abstentions, the nuclear non-proliferation treaty hoping for widest possible adherence. Australia, Israel, South Africa, and Pakistan, among those voting for the resolution, specifically reserved their position on signing the treaty. Albania, Cuba, Tanzania and Zamlia voted against the resolution. Countries with considerable nuclear significance like India, Argentina, Lrazil and Spain abstained from voting. Even Australia, which is a near-nuclear country, and Israel, credited with having nuclear technological capacity and a big beneficiary from American aid, made reservations regarding signing the treaty. France, the fourth nuclear weapon power and member of the Security Council, abstained on the resolution, neither commending the three-power NPT draft nor condemning it. She has declined to sign the treaty.

The vote on the treaty came on June 12, 1968, seven weeks after the General Assembly resumed its 22nd session to consider the agreement negotiated over a period of four years in the Geneva Disarmament Committee.

President Lyndon B. Johnson underscored the importance the United States placed on the treaty by appearing personally before the General Assembly. In his speech Mr. Johnson urged new efforts to halt the nuclear arms race and to find new ways to eliminate conventional conflicts. The President pointed out the main features of the treaty as under:

It goes far to prevent the spread of nuclear weapons.

It commits the nuclear powers to redouble their efforts to end the nuclear arms race and to achieve nuclear disarmament.

It will ensure equitable sharing of the peaceful uses of nuclear energy under effective safeguards for the benefit of all nations.

Under the treaty the nuclear powers agree not to transfer nuclear weapons or control over them to any recipient whosoever or to provide assistance in producing weapons to a non-nuclear weapon country; and the non-nuclear countries agree neither to receive the weapons nor manufacture them. The 'have-nots' signatories to the treaty are thus permanently harred from entering into the nuclear club, while it gives full liberty to the 'haves' of developing and multiplying their nuclear weapons. The nuclear powers have pledged to make available their nuclear know-how to the non-nuclear-weapon states in the many fields of using nuclear energy for peaceful purposes. Safeguards for preventing diversion of peaceful nuclear establishments to military use are to be worked out in negotiation with the International Atomic Energy Agency.

The greatest drawback of the treaty, as already stated, is that it has left the issue of control and inspection unsolved. Without control and inspection it would be difficult to find out to what extent the individual member countries who are signatories are faithfully observing the terms of the treaty. The treaty is in fact full of reservations. It will only enable the nuclear powers to lay down the law for the non-nuclear powers, while they the mselves give no guarantee of nuclear disarmament, partial or complete, on their own part.

The signatories to the treaty will, no doubt, forfeit their freedom to develop their own nuclear deterrent; but the nuclear protection assured to them may, at the time of need, prove to be a mirage fraught as it is with various political factors including differences between the two old adversaries now friends in a clever nuclear non-proliferation treaty.

After the passage of the above resolution in the United Nations, Britain, United States and Soviet Union also sought an early meeting of the Security Council to consider the question of security assurances to countries signing the nuclear non-proliferation treaty and to give them in effect a nuclear umbrella. They tabled a draft resolution in which they agreed to act immediately in accordance with the United Nations Charter in the event of nuclear aggression or threat of such aggression against a non-nuclear state which has signed the nuclear-non-proliferation treaty.

At a meeting of the U. N. Security Council held on June 17, 1968, the United States, Soviet Union and Britain made identical declarations of their against non-nuclear signatories to the Nuclear Non-Proliferation Treaty. The three powers declared that "any State which commits aggression accompanied aware that its actions are to be countered effectively by measures to be taken or remove the threat of aggression."

On June 19, 1968, the Security Council adopted the U. S.-U. S. S. R.-U. K. resolution by 10 votes to nil with five abstentions (Algeria, Brazil, France, India and Pakistan) whereby the three nuclear weapon powers pledged themselves to seek immediate Security Council action in the event of nuclear aggression or threat of aggression against a non-nuclear weapon State and further pledged themselves to provide assistance pending Security Council action to any State that is a party to the N. P. T.

The Indian representative at the United Nations reiterated in the Security Council India's national decision to use nuclear energy exclusively for peaceful purposes but added at the same time that the internationa community's interest in encouraging non-nuclear weapon States to remain non-nuclear could be achieved only by ensuring the security of all nonnuclear weapon States in conformity with the United Nations Charter regardless of whether or not they sign the N. P. T. He emphasized that any security assurances that might be offered by the nuclear weapon States could not and should not be regarded as quid pro quo for signature. threat of nuclear weapons to non-nuclear weapon States arises directly from the possession of such weapons by certain States. That threat has nothing to do with signature or no signature of a particular N. P. T. has existed in the past and would continue to remain even after the N. P. 1. has been concluded until such time as the nuclear menace has been eliminated altogether. The assurance of security to non-nuclear weapon States is an obligation on the nuclear weapon States and not something which they could or should offer in return for signature by the non-nuclear States of the N. P. T. The action by the Security Council for maintenance of international peace and security had to be under the Charter of the United Nations. Any linking of security assurances to signatory of the N. P. T. would be

contrary to its provisions because the Charter does not discriminate between those who might adhere to a particular treaty and those who might not do so. Under Article 24 of the Charter members of the United Nations have conferred on the Security Council primary responsibility for the maintenance of international peace and security and have agreed that, in carrying out its duties under this responsibility, the Security Council acts on their behalf.

The Pakistani representative stated that as long as nuclear stock-piles are not physically dismantled and as long as the N. P. T. not universally adhered to, there will always remain the possibility of a threat to breach of peace and the emergence of other powers acquiring nuclear weapons and, even in the unforesecable future, of an existing nuclear power changing its policies.

The treaty has brought to the fore wide difference of views between States, the adherents and non-adherents of the treaty, on the ground of its discriminatory character, violation of the U. N. Charter and the credibility gap existing even among its supporters. The two other nuclear powers, viz. France and China, have already dissociated themselves from the treaty, the former seeking more intensive atomic weapons test and the latter denouncing it as 'nuclear colonialism'. In the circumstances, the treaty is not expected to achieve its aim of arresting the proliferation of nuclear weapons.

However, with the adoption by the Security Council of the U. S.-Soviet-British resolution on security assurances, the way was cleared by the three powers as the depository Governments to open the treaty for signature on July I, 1968, at Washington, London and Moscow.

Outer Space Treaty.—An international treaty barring military activities in outer space and prohibiting States from placing weapons of mass destruction in orbit around the earth and installing such weapons on the moon and other celestial bodies was unanimously approved by the U. N. General Assembly in December 1966 and was signed on January 27, 1967. The treaty specifically provides that the moon and other celestial bodies must be used exclusively for peaceful purposes. It eventually came into force on October 10, 1967; and President Johnson renewed appeals for U. S. Soviet space cooperation at a White House ceremony at which 13 countries deposited instruments of ratification of the treaty. Parallel ceremonies took place in London and Moscow. The United States President paid tribute to the intelligence, determination and courage of the Soviet Union in placing the first sputnik into orbit ten years ago and launching space exploration and observed that, by adding the treaty to the law of nations, they were forging a permanent disarmament agreement for outer space.

As already stated, the principles governing the activities of States in the exploration and use of space are set out in the international treaty commended to States by the General Assembly in 1966. Besides this instrument, which came into force in 1967, there is an agreement on the rescue and return of astronauts and the return of objects launched into outer space, under which parties agree to procedures for aiding the crews of spacecraft in the event of accident or emergency landing. Current efforts in space law are concentrating on an agreement governing liability for damage caused by objects launched into outer space, which the Committee on the Peaceful Uses of Outer Space is attempting to draft.

To promote the spread of space technology to countries which might not yet be aware of the benefits it can bring the United Nations organized in August 1968 in Vienna a Conference on the Exploration and Peaceful Uses of Outer Space. It is studying one particular area of "space applications"—the future use of satellites to beam education television broadcasts direct to community television receivers or even to indsvidual homes, without the need for complex and expensive ground reception installations. In 1970, both the Economic and Social Council and the Outer Space Committee, looking to the day when satellites may be used to survey the earth's mineral, food, water and other resources, have been considering how the United Nations can best promote this development so that it will benefit all countries.

Peaceful Uses of Outer Space and Seabed.—Soon after the launching of the first artificial satellite in 1957, the United Nations applied its mind to drawing up plans for the peaceful uses of the outer space. In Resolution 1721 (XVI) of December 20, 1961, the General Assembly accepted the principle that Internasional Law applied to outer space and celestial bodies also.

In December 1966, the Treaty on Principles Governing the Activities of States in the Exploration and use of Outer Space (including the Moon and other celestial bodies was introduced in the General Assembly. It stipulated that the outer space, including natural satellites and planets of the sun should be used and exploited for the benefit of all mankind, that there shall be freedom of scientific investigation there, which shall never be used for warlike efforts or purposes; also, that States shall bear international responsibility for national activities in outer space and shall be liable for any damage to another party caused by their activities. The treaty was signed on January 27, 1967, simultaneously in Washington, London and Moscow.

On January 21, 1971, the Academy of Sciences of the U.S. S. R. and the U.S. National Aeronauties and Space Administration signed an agreement for better cooperation in space efforts. The agreement stipulates that outer space shall not be used for preparation and operation of war, that working groups of both parties shall cooperate in further exploration and utilisation of outer space, and that the parties shall exchange information and extra-terrestrial samples from outer space. As a consequence of this agreement, the Mars exploration program, which is a more complicated operation, than the lunar program, is being conducted in a spirit of mutual cooperation between the two countries.

Another field of concern for the U. N. is the peaceful use of the seabed and the ocean floor beyond the limits of national jurisdiction. In 1969, the General Assembly declared that until an international agency was established, no State shall exploit the resources of the seabed and ocean floor beyond national jurisdiction.

The 1958 Geneva Convention on the High Seas: lays down the procedure for the laying of submarine cables and pipelines on the bed of the high seas. It makes the breaking or injuring of such cable or pipeline a punishable offence and affords all states reasonable freedom to lay such systems on the seabed.

Progress towards Disarmament.—The Treaty on the Non-Proliferation of Nuclear Weapons came into force on March 5, 1970. On that day the Secretary- General noted that almost 100 States by then had signed the treaty which was a step towards disarmament, but "not an end in itself".

In November 1969, the Soviet Union and the United States had held preliminary discussions in Helsinki, Finland, with regard to what is called Strategic Arms Limitation Talks (SALT). Shortly afterward, the General

<sup>1.</sup> Ct. U. N. Publication, XXV Anniversary of the Organization.

Assembly expressed satisfaction that the talks had been initiated. It also appealed to the countries, as a preliminary measure, to stop further work on the development of such weapons. In April 1970, the two super-Powers began their substantive talks in Vienna on the limitation of strategic arms.

A treaty prohibiting nuclear weapons in Latin America came into force in 1969. It was an important development which gave a ray of light in the field of disarmament. Known as the Treaty of Tlatelolco, it was in a sense, "an offspring of the United Nations". In 1963 the General Assembly had first given its blessing to the idea of creating a nuclear free zone in Latin America. It was be hoped that with additional signatures and ratifications of the treaty it would possible to ensure that none of the States of the area would manufacture or acquire nuclear weapons and that the nuclear-weapons Powers would not station, deploy, use or threaten to use such weapons against any of the States of Latin America. U Thant said that the States of the region had taken a first important step towards disarmament and the expansion of the peaceful use of nuclear energy, and had given the world some novel ideas concerning control. He hoped that the system involved would provide a model for other nuclearweapon-free zones and for additional measures of global disarmament. Despite past Assembly appeals only two of the five nuclear powers (the United Kingdom and United States) signed the protocol on prohibition of nuclear weapons in Latin America.

A report on the question of chemical and bacteriological (biological) weapons and the effects of their possible use was submitted by the Secretary-General in 1969 to the General Assembly. The report stated that although all weapons were destructive of human life, chemical and bacteriological weapons stood in a class of their own as armaments which exercise their effects solely on living matter. The idea that bacteriological (biological) weapons could deliberately be used to spread disease generates a sense of horror.

Seabed Treaty.—On 7th December, 1970, the United Nations General Assembly adopted a resolution by which it commended the treaty on the prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil thereof. The treaty while recognizing the common interest of mankind in the progress of the exploration and use of the sea-bed and the ocean floor for peaceful purposes and preventing nuclear arms race on the sea-bed and the ocean floor for maintaining world peace, provides that the States Parties o this Treaty undertake not to emplant or emplace on the sea-bed and the ocean floor and in the subsoil thereof beyond the outer limit of a sta-bed zone (i. e., beyond a 12 nautical mile coastal 'sea-bed zone', any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons. The above undertakings shall also apply to the sea-bed zone, except that within such sea-bed zone, they shall not apply either to the coastal State or to the sea-bed beneath its territorial waters. The States Parties to this Treaty further undertake not to assist, encourage or induce any State to carry out activities referred to above and not to participate in any other way in such actions. In order to promote the objectives of the treaty each State Party to the treaty has been given the right to verify through observation the activities of other State parties to the treaty on the sea-bed and the ocean floor and in the subsoil thereof.

U. N. Convention on the Prohibition of Bacteriological and Toxic Arms.—The United Nations' 26th General Assembly commended in 1971 the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction. The signatories undertake not to develop, acquire or stockpile biological weapons, and ple dge to destroy such agents or divert them to peaceful purposes, not later than nine months after the convention enters into force. On April 10, 1972, the representatives of the United States of America, U. S. S. R., Britain and 44 other countries signed the convention. The convention constitutes a step on the road to general disarmament and represents the first agreement providing for the complete destruction of all existing bacteriological and toxic weapons.

The question of banning chemical weapons was, however, still engaging the attention of the Conference of the Committee on Disarmament (CCD). Pending an agreement on such a treaty, the General Assembly urged all States to refrain from any further development, production or stockpiling of those chemical agents for weapons purposes, which because of their degree of toxicity have the highest lethal effects and are not usable for peaceful purposes.

U. S.-Soviet Treaty on Arms Li. nitation, 1972.—On May 26, 1972, President Nixon and the Soviet leaders reached agreement on the issue of limiting strategic nuclear arms. The-U. S. Soviet treaty on the limitation of anti-ballistic missile (ABM) systems stipulates that proceeding from the premise that nuclear war would have devastating consequences for all mankind, each party undertakes to limit anti-ballistic missile (ABM) systems and to adopt other measures in accordance with the provisions of the treaty. Each party undertakes not deploy ABM systems for the defence of the territory of its country and not to provide a base for such a defence, and not to deploy ABM systems for defence of an individual region except as provided for certain situations specified below.

For the purposes of this treaty, an A B M system is a system to counter strategic ballistic missiles of their elements in flight trajectory.

Each party further undertakes not to deploy A B M systems of their components except that (a) within one A B M system deployment area having a radius of 150 kilometres and centred on the party's national capital, a party may deploy: (1 no more than 100 A B M launchers and no more than 100 A B M interceptor missiles at launch sites, and (2) A B M radars within no more than six A B M radar complexes, the area of each complex being circular and having a diameter of no more than three kilometres.

The above limitations shall not apply to A B M systems or their components used for development or testing and located within current or additionally agreed test ranges. Each party may have no more than a total of 15 A B M launchers at ranges.

A B M systems or their components in excess of the numbers or outside the areas specified in this treaty, as well as A B M systems or their components prohibited by this treaty, shall be destroyed or dismantled under agreed procedures within the shortest possible agreed period of time.

The treaty has paved the way for other agreements leading to general disarmament, it being the first concrete move to end the strategic armaments race, which now constitutes a threat of nuclear conflict. The Secretary-General Kurt Waldheim viewed it as a major step in the direction of halting and

reversing the arms race, particularly the nuclear arms race and hoped that it would lead to reduction of weapons arsenals and thus promote general and complete disarmaments.

The arms treaty has still left the door open to a nuclear arms race. The five-year freeze only limits the number of intercontinental missiles each country can stock, but it leaves each party free to increase the explosive power or add to the number of warheads which each rocket can deliver. Furthermore, the agreement refers only to land-based or submarine-carried missiles, leaving out strategic bombers.

The United States and the Soviet Union have only accepted the strategic arms parity between themselves and decided to stabilise the strategic arms equation between themselves as super-powers.

Disarmament decade,—The United Nations has proclaimed the 1970 as Disarmament Decade in the hope that concerted efforts will be made during the coming years to end the nuclear arms race, climinate weapons of mass destruction, and agree on a treaty for general and complete disarmament under strict and effective international control. Negotiations in the United Nations bodies and elsewhere have already led to a number of collateral measures in the field of arms limitation and disarmament including treaties on preventing the spread of nuclear weapons, prohibiting nuclear tests in the atmosphere, outer space and under water, banning emplacement of nuclear weapons on the sea-bed, banning nuclear weapons on the moon or in orbit around the earth, and, most recently, banning biological weapons. But the partial steps have not reversed the arms race, which grows ever more perilous. The arms race not only is a danger in itself; it diverts enormous resources and energy from peaceful economic and social pursuits to unproductive and une conomic military purpos es.

The 27th session of the General Assembly of the United Nations, which met in New York from 19th September to 19th December, 1972, adopted nine resolutions on disarmament matters. By 100 votes to none, with 10 abstentions the Assembly requested the International Atomic Energy Agency to consider ways to allow developing countries to benefit fully from the technical assistance given by international organizations. This was an implementation of the Conference of Non-Nuclear States The Assembly adopted two resolutions on general and complete disarmament. It deplored the use of napalm and other incendiary weapons in armed conflicts and requested the Secretary-General to bring to the attention of all Governments the report of a committee of experts on this matter. The Assembly appealed to the United States and the Soviet Union to speed up new agreements on important qualitative limitations and substantial reductions of offensive and defensive systems of strategic nuclear weapons.

The Assembly requested that the Geneva Disarmanient Conference give priority to the preparation of an agreement to forbid chemical weapons. In one resolution on suspension of tests, the Assembly expressed deep concern that nuclear weapons testing in the atmosphere had continued in certain parts of the world, including the Pacific area, contrary to the spirit of the Treaty of Moscow and world public opinion. It underlined the urgency of ending all atmospheric tests in the Pacific or elsewhere and requested the Geneva Disarmament Conference to consider a treaty prohibiting all nuclear tests. Another resolution urgently invited all States which had not yet adhered to the Treaty of Moscow to do so, and meanwhile to refrain from tests in environments covered by that treaty. By another resolution the Assembly

requested nuclear States to end all nuclear tests as early as possible, and in any case before 5th August, 1973,-the tenth anniversary of the Treaty of Moscow-either by concluding a permanent agreement or by unilateral or negotiated moratoriums.

The Assembly also approved a resolution on the Treaty of Tlatelolco which aims to establish a nuclear-weapon-free zone in Latin America. It recalled with particular satisfaction that the United Kingdom and the United States had become parties to the additional protocol to the treaty. It also welcomed a statement by the Chinese Government on November 14, 1972, that it would never use nuclear weapons against a non-nuclear country of Latin America and would not establish nuclear weapons in the denuclearized zone. The Assembly deplored the fact that the two other nuclear Powers had not responded to its urgent requests for them to adhere to the additional protocol. The Soviet Union stated that it could not adhere to the protocol because of loopholes in the text. The protocol had not been discussed with the States concerned and did not forbid transit of nuclear weapons through the territory of denuclearized States. France appealed for genuine disarmament under international control, and said that the agreements of recent prevented States from becoming nuclear Powers or prohibited the deployment of certain armaments in particular areas. Instead of leading to general disarmament, such an undertaking tended to stabilize a preponderance of the armed forces of the Big Powers to their advantage and to confirm their military privileges.

On November 29, 1972, the Assembly adopted, by 73 votes to 4 (China, Albania, South Africa, and Portugal), with 46 abstentions a resolution declaring, on behalf of member States, their renunciation of the use of force and the permanent prohibition of the use of nuclear arms. Based on an initiative by the Soviet Union the resolution recommended that the Security Council act promptly to give it effect.

# Concept of Indian Ocean as a Zone of Peace

In December 1971, on the initiative of Ceylon and other member nations bordering the Indian Ocean, including India, the U. N. General Assembly declared the Indian Ocean together with the air space above and the ocean floor subjacent thereto 'a zone of peace'. The Assembly also called for consultation between the countries bordering the Indian Ocean and other powers, with the aims of halting escalation and expansion of the military presence of the great powers in the Ocean, climinating from the area all military bases and disposition of nuclear weapons.

The Indian Ocean, which had remained a 'British Lake' until the decline of the British naval power after the Second World War was largely dominated by Great Britain with a view to keeping control of the littoral States of the Indian Ocean. With the withdrawal of the British, and Singapore's independence leading to the loss of their last base in the eastern part of the ocean, the Indian Ocean has become a real naval vacuum. Though not possessing the financial resources to play her dominant role in the area, her close relationship with Australia, economic interests in Malaysia and Singapore and treaty commitments in the area induce Great Britain to maintain her role in the region as far as possible.

The Indian Ocean, of late, has become an area of great power rivalry. The United States maintains a fleet of warships in the Persian Gulf. Its foreign policy stands committed to the maintenance of a naval presence in the Indian Ocean with a view to supporting military intervention just as its Seventh

which could not be fulfilled, it may have been responsible for some deception of popular opinion. The Permanent Court of Arbitration is not really a Court. Nor is it in any accurate sense a tribunal, though it is often referred to as 'The Hague Tribunal'; instead it is a device for facilitating the creation of ad hoc tribunals. It is permanent only in the sense that a panel is permanently available from which arbitrators may be chosen, that the Administrative Council is constituted as a continuing body, and that a permanent International Bureau exists to facilitate the creation of tribunals."

Awards.—Twenty awards were given by the Permanent Court of Arbitration at The Hague between 1902 and 1923, including those of the North Atlantic Fisheries Dispute between U. S. A. and Great Britain (1910), Savarkar's Case in 1911 and the dispute between Norway and U. S. A. regarding requisition of Norwegian ships in First Verld War (1922).

## Cases Before the Tribunal

- 1. Pious Fund Case (1902)—In this case the dispute was between the United States of America and Mexico, which had earlier been decided by the Mixed Claims Commission upholding a claim to 21 years' interest on the Pious Fund—an old Roman Catholic Charitable Fund. This amount having been paid by the Mexican Government who administered the fund for the benefit of the Californians, further instalments of interest were later claimed by the Bishops. In 1848 a portion of the territory had been ceded to the United States. It was contended by the United States that the matter was res judicata. The matter was then by an agreement referred by the two Governments to five members of the Permanent Court of Arbitration. By an unanimous award the Tribunal held that because of the identity of the subject-matter and parties the claim was res judicata.
- 2. The Japanese House Tax Case (1905).—This case referred to a tribunal consisting of three "members of the Permanent Court of Arbitration at The Hague," the parties being France, Germany and Great Britain on the one side and Japan on the other. The question that fell for consideration was whether under the treaties in force, buildings and lands held under perpetual leases by Great Britain, France and Germany were exempt from taxa tion other than that stipulated in the leases, Japan having claimed the right to levy a tax upon the buildings erected upon the said lands. The award, dated the 22nd of May, 1906, answered the question in the affirmative by deciding against Japan.
- 3. Casablanca Case (1909).—This was a dispute between the French and German Governments on account of the arrest of certain deserters from the French Foreign Legion in Casablanca on September 25, 1908. The dispute was referred to a tribunal of five members of the Permanent Court of Arbitration by a compromis signed on November 24, 1908. In consequence of the award both the Governments expressed their regret for the conduct for which their officials were blamed in it.
- 4. North Atlantic Fisheries Case (1916).—A special agreement was drawn up on January 27, 1909, whereby the American and British Governments agreed to refer certain questions to an Arbitral Tribunal chosen from

<sup>1.</sup> Treatise on the Permanent Court of International Justice, p. 11.

the members of the Permanent Court of Arbitration at The Hague. The United States claimed the right to take fish on certain parts of Newfoundland and further claimed that regulation with regard to fisheries must be made jointly by Canada and Great Britain and U. S. A., and not by Great Britain and Canada alone. The tribunal by its award held that the liberties of fishery granted to the United States did not constitute an international servitude in their favour. It further held that the exercise of the right of Great Britain to make regulations without the consent of the United States was limited in that such regulations must be bona fide and must not be in violation of the treaty of 1818.

- 5. Savarkar's Case (1911).—Savarkar, an Indian leader being a prisoner on a British mail steamer ship, Morea, escaped while being transported from England to India when the ship touched Marseilles. He was arrested by the French police and handed over to the captain of the ship without any extradition proceedings. The French demand for the restitution of the fugitive was refused by the British Government. The question that fell for consideration before the Tribunal consisting of five members of the Permanent Court of Arbitration was whether in conformity with the rules of International Law the fugitive should be restored to the French Government. The Tribunal answered the question in the negative, observing that there was no rule of International Law which imposed in such circumstances an obligation on the Power which had in its custody a prisoner to restore him because a mistake had been committed by the foreign agent who delivered him up to that Power.
- 6. Canevaro Case (1912).—The three Canevaro brothers lodged a claim against the Peruvian Government on the ground of being Italian nationals, which by mutual consent was referred to a Tribunal constituted in accordance with Article 87 of the Hague Convention of 1907. The Tribunal upheld the claim of two brothers only against the Peruvian Government, the third having been declared to be a Peruvian citizen and as such not an Italian claimant.
- 7. Russian Indemnity Case (1912).—This was a dispute over payment of interest on the indemnity payable by Turkey to Russian subjects and institutions for damages sustained during the war as a result of the Treaty of Constantinople of January 27/ February 8, 1879. The dispute was referred to a Tribunal consisting of the members of the Permanent Court of Arbitration. The Tribunal declared that the Russian claim was admissible but held that the Turkish Government was not bound to pay interest-damages.

Some other cases decided by the Court of Arbitration are Maritime Frontiers Case (1909) between Norway and Sweden, Carthage and Manouba Case (1913) between France and Italy, Timor Case (1914) between Netherlands and Portugal, Religious Properties in Portugal Case (1920) between France, Great Britain, Spain and Portugal, Dreyfus Case (1921) between France and Peru, Island of Palmas Case (1928) between U. S. A. and Netherlands and Chevreau Case (1931) between France and Great Britain.

The Permanent Court of Arbitration still exists, although no case has been referred to a Tribunal constituted under its provisions since 1932.

#### CHAPTER XXXVIII

## II. THE PERMANENT COURT OF INTERNATION \L JUSTICE

Creation of the Court.—The Permanent Court of International Justice was established in 1921 in accordance with the provisions of Article 14 of the Covenant of the League of Nations, signed at Versailles on June 28, 1919. That Article provided:

"The Council shall formulate and submit to the members of the League for adoption plans for the estab ishment of a Permanent Court of International Justice."

The Council accordingly on February 13, 1920, invited a number of distinguished jurists to form a committee to prepare plans for the establishment of the Court and to report to the Council. They thereupon drew up a scheme, which, in the main, was adopted by the Council and the Assembly.

Members of the Court.—The Court was composed of a body of independent judges, 15 in number, regardless of their nationality from among persons of high moral character having the qualifications for appointment to the highest judicial offices in their respective countries. They were elected for nine years but could be re-elected. The election of the Judges was entrusted to the Assembly and the Council from a list of persons nominated by the national groups in the Court of Arbitration. An absolute majority of the votes cast was necessary for an election. The election was definitive only on the acceptance of the candidate. Article 31 of the Statute provided that Judges of the nationality of each contesting party had their right to sit in the case before the Court.

A quorum of nine Judges constituted the Court.

Article 21 provided that the Court shall elect its President and Vice-President for three years, and shall appoint its Registrar.

The seat of the Court was established at The Hague.

The Court began functioning on February 15, 1922, with 15 members i.e., 11 Judges and 4 Deputy Judges, when they made their solemn declarations.

Diplomatic privileges.—Article 19 of the Statute provided that "the members of the Court when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities."

Improvement on the Arbitration Court.—The Permanent Court of International Justice was a distinct improvement upon the Permanent Court of Arbitration. It was aptly remarked that the Court of Arbitration as envisaged in the 1899-Convention was "difficult, time-consuming and expensive to set in motion" and "afforded no basis for the cumulation of a body of jurisprudence. The Convention of 1907, although called for the creation of a Court of free and easy access, composed of Judges representing the various judicial systems of the world, and capable of ensuring continuity in arbitral jurisprudence," the Tribunal composed at The Hague was not a permanent Court. Its Judges were also not a body of permanent officials. In fact, the Tribunal could only be called as Court by courtesy; it was simply a device

for creating ad hoc tribunals. The Permanent Court of International Justice, on the other hand, was a permanent Court composed of Judges and officials for a certain duration. Here there was no option to the States to select their own Judges from a panel as was the case in the Permanent Court of Arbitration.

Access to Court.—Article 34 of the Statute provided that only States or Members of the League of Nations could be parties in cases before the Court. Article 35 opened the Court to the Members of the League of Nations and to States mentioned in the Annex to the Covenant but not members of the League of Nations, who became a party to the Protocol of Signature of December 6, 1920.

Jurisdiction of the Court.—Under Article 36 of the Statute the jurisdiction of the Court comprised all cases which the parties to a dispute referred to it; bound themselves by a special provision in a treaty or convention in force; or by a declaration recognised the Court's jurisdiction "as compulsory pso facto and without special agreement." Under Article 37 of the Statute when a treaty or convention in force provided for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court was to be such tribunal. It was further provided that members might accept the optional clause by signing a separate protocol, the signature whereof involved the adjudication in the following matters, viz.

- (1) the interpretation of a treaty;
- (2' any question of International Law;
- (3) the existence of any fact, which, if proved, would involve a breach of an international obligations and.
- (4) the nature or extent of the reparation to be made for the breach of an international obligation.

More than 20 States gave their acceptance to the protocol, the British Government accepting the jurisdiction of the Gourt in 1927 with some reservation.

The Court's advisory opinion could not be give proprio motu; the Court could act only when it had seisin of a request, which could emanate only from the Council or the Assembly of the League of Nations.

To sum up, the general principle of International Law as affirmed in the case of Eastern Carelia laid down that States could not be compelled to litigate their disputes without their own consent and that the jurisdiction of the Court was confined to cases voluntarily submitted to it, except where one of the parties to a dispute had expressly bound itself in advance to accept the jurisdiction of the Court in the case of any particular dispute or class of disputes. The jurisdiction of the Court fell into voluntary, compulsory and advisory jurisdiction. The compulsory jurisdiction arose (i) in consequence of special treaty arrangements, e.g., the interpretation of the Treaties of Peace concluded at the end of the first world war, disputes as to the interpretation of mandates, etc.; (ii) by virtue of making a general declaration under Art. 36 of the Statute referred to above. The Court also acted as an advisor on points of law to the Council and Assembly of the League.

Laws Applicable.—Article 38 of the Statute set out four categories of sources of law which the Court was directed to apply, riz., (i) International Conventions; (ii) International Custom; (iii) General principles of law accepted by civilized States; and (iv) Judicial decisions and teachings of the most highly qualified publicists of the various nations.

Procedure.-French and English constituted the official languages of the Court, but the Court could authorise the use of another language also. The parties were represented by Agents and had the assistance of counsel. The procedure provided for presentation of written cases and counter-cases, and of an oral hearing by the Court of witnesses, experts, counsel, etc. All questions, including the judgment, were decided by a majority. No appeal was provided from the judgment, but the judgment could be revised in exceptional cases on new facts coming to light. Reasons were given for the judgment. The judgments of the Court had no binding force in subsequent cases, and each judgment stood on its own merits and the Court could disregard its own previous decisions if it thought fit to do so.

Important Decisions of the Permanent Court

1. The S. S. Wimbledon. 1-On the 21st March, 1921, the Wimbledon a British vessel, was refused access to the Kiel canal Ly the German authorities. The Court held that it was the duty of Germany to have permitted the passage of the Wimbledon through the Kiel canal within the meaning of Article 380 of the Treaty of Versailles, which laid down that the Kiel canal shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany.

2. German Settlers in Poland.2—On a reference being made by the Council of the League of Nations for an advisory opinion, the Court observed : ".....even those who contest the existence in International Law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty."

3. Polish Upper Silesia Case. 1 - In the German Interests in Polish Upper Silesia Case, the Court took the generally accepted International Law to constitute, at least in part, the basis of the Geneva Convention.

It further held that "the abandonment by Germany of her rights and titles under Article 88 of the Treaty of Versailles merely contemplates the possible renunciation of sovereignty over the territories in questi-n and cannot involve the immobilisati n of all movable and immovable property belonging to the State during the period from the day of the coming into force of the Peace Treaty until the transfer of sovereignty over Upper Silesia."

4. The S S. Lotus. -On August 2, 1926, a collision occurred between the French mail steamer Lotus and the Turkish collier Boz-Kourt in consequence of which 8 Turkish nationals on board lost their lives. The Court observed : "International Law governs relations between independent States The cules of law binding upon States therefore emanate from their own free will as expressed in conventions or ly usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore

The Court held that Turkey by instituting criminal proceedings in pursuance of Turkish law against Lt. Demons, officer of the watch on board the Lotus at the time of the collision, had not acted in conflict with the principles of International Law. The offence for which Lt. Demons had been prosecuted was an act of negligence or imprudence having its origin on board

<sup>1. ( 923)</sup> P. C. I. J. Ser. A. No. 1.

<sup>2. (1923)</sup> P. C. I. J. Ser. B. No. 6. J. (1926) P. C. I. J. Ser. A. No. 7

<sup>4. (1927)</sup> P. C. I. J. Ser A. No. 10.

the Lotus, whilst its effects made themselves felt on board the Boz-Kourt. These two elements were legally entirely inseparable, so much so that their separation rendered the offence non-existent, and as such each of the two States could exercise jurisdiction in respect of the incident as a whole.

5. The Case concerning the Factory at Chorzow.!—The Court observed: "It is a principle of law that any breach of an engagement involved an obligation to make reparation.....Reparation was the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself......The rules of law governing the preparation are the rules of International Law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage."

Other Cases.—Some of the other cases decided by the Permanent Court of International Justice are Danzig and the International Labour Organization, Eastern Greenland case, Interpretation of Greco-Turkish Agreement Interpretation of the Statute of Memel, Interpretation of the Treaty of Lausanne, Jurisdiction of the Courts of Danzig, Mavrommatis Concessions case, Minority Schools in Albania and Nationality Decrees issued in Tunis and Morocco (French Zones), Treatment of Polish Nationals in Danzig, Polish Postal Service in Danzig, and the Territorial Jurisdiction of the International Commission of the River Oder.

#### CHAPTER XXXIX

## III. THE INTERNATIONAL COURT OF JUSTICE

Its genesis.—The International Court of Justice is an organ of the. United Nations inasmuch as its Statute forms an integral part of its Charters. The result is that all the members of the United Nations are ipso facto particito the Statute. In this sense only it differs from the Permanent Court of International Justice inasmuch as the latter was legally not an organ of the League of Nations and its Statute constituted a separate international agreement different from the Covenant. The Statute is almost a literal copy of the Statute of the Permanent Court of International Justice.

The Second World War interrupted the work of the Permanent Court of International Justice, mainly due to the invasion of Holland by Germany, but its work in the period between the two wars raised a new vista of hope in its capacity to develop International Law and to achieve pacific settlement of disputes. Its judgments bear eloquent testimony to its sincere efforts in easing international tension by elucidating thorny questions of International Law. The Permanent Court of International Justice was finally dissolved by the final Assembly of the League of Nations in April 1946. Prior to this the Charter of the United Nations had already provided for the establishment of the International Court of Justice as one of the principal organs of the United Nations. The present Court met for the first time at The Hague on April 3, 1946.

Article 92 of the Charter specifically provides that the International Court of Justice shall be the principal judicial organ of the United Nations which shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice.

Organization of the Court.-The International Court of Justic like the Permanent Court of International Justice consists of fifteen Judges under a President and a Vice-President, elected by the members of the Court from among themselves. The Judges of the Court are elected by the Security Council and the General Assembly of the United Nations from among the candidates first nominated by the national groups of the Permanent Court of Arbitration. At least three months before the date of the election, the Secretary General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the States which are parties to the present Statute, and to the members of the national groups, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case may the number of candidates nominated by a group be more than double the number of seats to be filed. Before making these nominations, each national group is required to consult its higest Court of Justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law. The Secretary-General shall prepare a list in alphabetical order of all the persons thus nominated. The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court. At every election, the electors shall bear in mind not only that the persons to be eleted should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured. Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected. Provision has been made for a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council where one or more seats remain to be filled even after a third meeting.

The Judges are elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in International Law, but there are explicit provisions that no two Judges can be nationals of the same State. Judges of the Court are elected for nine years and may be re-elected. They cannot exercise any political or administrative functions or engage in any other occupation of a professional nature.

With regard to the independence of the Judges of the International Court of Justice, Kelsen very pertinently observes :

"In spite of these provisions the political independence of the judges is endangered by the influence the government have on their nomination through the institution of the 'national groups'; and this influence is all the stronger as the judges are, according to the new, just as according to the old, Statute, elected for a period of only nine years and may after their term has expired, be re-elected. There can be little doubt that appointment for life or with a certain age limit guarantees a higher degree of political independence than the method chosen by the Statute."1

<sup>1.</sup> Hans Kelsen: The Law of the United Nations, p. 472, 60

Article 31 of the Statute of the International Court of Justice permits Judges of the nationality of each of the parties to the dispute to retain their right to sit in the case before the Court. If the Court, however, includes upon the Bench a Judge of the nationality of one of the parties only, the other party has a right to choose his own nominee to sit as a Judge. If the Court does not include upon the Bench any Judge of the nationality of the parties, each of the parties may nominate a judge of his choice.

The seat of the Court is established at The Hague, but the Court can sit elsewhere also whenever it considers desirable. The President and the Registrar shall reside at the seat of the Court. The Court shall remain permanently in session, except during the judicial vacations.

Competence of the Court.—Article 34 (1) of the Statute lays down that only States may be parties in cases before the Court. The rigidity of the above rule is, however, softened by the two other subsequent clauses contained in Article 34 of the Statute. In the first place, the Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative. The Statute does not define a public international organization. Oppenheim defines it as a body created by a treaty between States and composed, at least in part, of representatives of States. In the second place, whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

Jurisdiction of the Court.—The Court exercises jurisdiction over States which are parties to the Statute and over other States who deposit with the Court's Registrar a declaration signifying their acceptance of the Court's jurisdiction in accordance with the Charter and Statute and Rules of the Court, undertaking to comply in good faith with the Court's decisions and accepting the obligations under Article 94 of the Charter. Article 94 of the United Nations Charter reads thus:

"Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

The jurisdiction of the Court is divided into three parts, viz., (1) voluntary (2) obligatory and (3) advisory.

- 1. Voluntary Jurisdiction.—Article 36 of the Statute of the Court provides that its jurisdiction comprises all cases which the parties refer to the Court (by agreement). The agreement to refer the dispute may be made by both the parties or one party only may refer the matter to the Court and the other party may signify his assent to the reference.
- 2. Obligatory Jurisdiction.—Paragraph 2 of Article 36 provides that the States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting t e same obligation, the jurisdiction of the Court in all legal disputes concerning:
- 1. Art, 36 (1) provides that the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Guarter of the United Nations or in treaties and conventions in force.

- (a) the interpretation of a treaty;
- (b) any question of International Law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation; and
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.

The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time.

The above declarations made by the States provide for compulsory jurisdiction by agreement, inasmuch as the Court can exercise jurisdiction only when both parties to the dispute have made the declaration as provided in paragraph 2 of Article 36. The declarations referred to above, as stated earlier may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time.

The Statute provides that declarations made under the old optional clause in the Statute of the Permanent Court of International Justice shall be deemed to be acceptances of the compulsory jurisdiction of the present Court. At the time of the formation of the present Court the declarations of 17 States were still in force, which were transferred to it. Most of the declarations are subject to a condition of reciprocity or contain some reservations.

The Court has also compulsory or obligatory jurisdiction where the parties concerned are bound by a treaty convention under which they agreed to refer the matter to a tribunal to have been instituted by the League of Nations or to the Permanent Court of International Justice and by virtue of Article 37 of the Statute such matters are automatically referred to the International Court of Justice. There are trusteeship agreements which contain a provision to refer the matter to the International Court of Justice in case of disputes between the administering authority and another member of the United Nations relating to the interpretation or application of the agreement. Then, certain specialised agencies also contain provisions to refer their disputes to the Court. But here again it may be stated that such disputes are submitted to the Court only by means of an agreement between the administering authority and the U. N. or among the specialised agencies.

As to matters specially provided for in the Charter paragraph 3 of Article 36 of the same provides that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

The general principle of International Law so far as the jurisdiction of the Court is concerned may be summed up thus: The States cannot be compelled to litigate their disputes before the Court without their own consent and the jurisdiction of the Court is confined to cases which are voluntarily submitted to it, except where one of the parties to the dispute has expressly bound itself in advance to accept the jurisdiction of the Court in respect of any particular dispute or class of disputes.

"In spite of the reservations", observes Oppenheim, "the Optional Clause constitutes the most comprehensive and most important instrument of obligatory judicial settlement. Apart from the reservations, there is probably no dispute which does not come within the purview of the four categories of disputes enumerated in the Optional Clause. The obligations undertaken by

virtue of the Optional Clause have become an important source of the activity of the Court. At the same time it is not likely that the authority and the usefulness of the Court will attain their full—or desirable—stature until the substance of the acceptance of the Optional Clause approximates more closely than it does now to the moral duty which members of a society owe to one another to submit without reservation their disputes to judicial tribunals administering International Law.

- 3. Advisory Jurisdiction.—The Court may give an advisory opinion on any legal question referred to it by the Security Council or the General Assembly. (Art. 65). The other organs of the United Nations and the Specialised Agencies, when empowered by the General Assembly, can also ask for advisory opinions on legal questions. The relevant article on this point is Article 96 of the Charter, which reads thus:
- "1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
- "2. Other organs of the United Nations and specialised agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

Most of the agreements that enable certain specialised agencies to work in close contact with the United Nations contain provisions which authorise these agencies to request advisory opinions of the International Court of Justice on legal questions arising within the scope of their activities.

Such advisory opinion is not binding upon the parties, but States may by treaty or agreement bind themselves in advance with regard to such advice as may be tendered by the Court. This has been done in the treaty known as the General Convention on Privileges and Immunities of the United Nations, S. 30 of which provides that all differences arising out of the interpretation or application of the present convention between the United Nations on the one hand and a member on the other hand shall be referred to the International Court of Justice for an advisory opinion on any legal question, and the opinion given by the Court shall be accepted as decisive by the parties.

"The advisory jurisdiction", observes Oppenheim, "has in fact proved to be much more fertile and more important than was originally contemplated. The number of advisory opinions given by the Court almost equals that given by way of judgments."

Procedure with regard to exercise of Advisory Jurisdiction.—Questions upon which the advisory opinion is asked are laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question. The procedure is that the Registrar has forthwith to give notice of the request for an advisory opinion to all States entitled to appear before the Court. He has also, by means of a special and direct communication, to notify any State entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other States or organizations

in the form, to the extent, and within the time limits which the Court, or, should it not be siting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written Statements to States and organizations having submitted similar statements. The Court has to deliver its advisory opinions in open Court, notice having been given to the Secretary-General and to the representatives of members of the United Nations, of other States and of international organizations immediately concerned. In the exercise of its advisory functions the Court is further guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

Immunities of the Judges.—The members of the Court, when engaged on the business of the Court, enjoy diplomatic privileges and immunities. The agents, counsel and advocates of parties before the Court also enjoy the privileges and immunities necessary for the independent exercise of their duties. The salaries, allowances and compensation of the members of the Court and the Registrar are free of all taxation.

The Law to be applied by the Court.—Article 38 of the Statute provides that the International Court of Justice, whose function is to decide in accordance with International Law such disputes as are submitted to it, shall apply.

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

According to Article 59 of the Statute the decision of the Court has no binding force except between the parties and in respect of the particular case.

Procedure of the Court.—Cases are brought before the Court either by a notification of the special agreement or by a written application addressed to the Registrar. The full Court sits for the decision of a dispute unless otherwise provided in the Statute. A quorum of nine Judges constitutes the Court. All questions, including the judgment, are decided by majority. In the event of an equality of votes the President or the Judge who acts in his place has a casting vote. The judgment is final and without appeal. The judgment may be revised by the Court only upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision and provided such ignorance was not due to negligence. Reasons are given for the judgment. As stated above, judgments of the Court are not legally binding in subsequent cases and each judgment stands on its own merits. The Court can with impunity disregard its own previous decisions if it thinks fit to do so. The official languages of the Court are French and English, but the Court can authorise the use of another languages also.

The procedure with regard to the hearing of cases consists of two parts, viz., written and oral. The written proceedings consist of the communica-

tion to the Court and to the parties of memorials, counter-memorials and, if necessary, replies, along with papers and documents filed in support of the same. The oral proceedings consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

Interim or Provisional Measures.—Article 41 of the Statute of the Court provides for provisional measures which the Court might indicate pending the decision of the dispute. It reads:

- "I. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
- "2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council."

Anglo-Iranian Oil Company Case. 1—In the Anglo-Iranian dispute over the nationalisation of Persia's oil industry, Britain along with the Anglo-Iranian Oil Company applied to the International Court of Justice for provisional steps to be taken to preserve her rights in Persia until a decision was reached on the merits. In the meantime Persia ordered seizure of the Anglo-Iranian oil installations by virtue of the decree issued by it on June 23, 1951. The International Court of Justice by its ruling of July 5, 1951, upheld the British Government's plea for a freeze in the Persian oil dispute. The Court in its majority opinion decided that both Governments should refrain from measures which would prevent the flow of oil on the same basis as before May 1 when Persia passed the nationalisation law. The Court recommended the appointment of a board of supervision composed of two members from each Government and a fifth who should be a national of third State chosen by agreement between Britain and Persia for ensuring that operations of the oil industry continued unhampered.

The Persian Government rejected the ruling of the International Court of Justice on the Anglo-Iranian oil question on the basis that the Court had no jurisdiction over the matter, inasmuch as the order amounted to a virtual injunction by the Court against a sovereign State directingit to adjust its internal affairs according to the dictates of the Court.

In the meantime Britain referred the matter to the Security Council and the latter agreed to discuss the British complaint against Persia. On October 19, 1951, the Security Council adjourned discussion of the Anglo-Persian oil dispute until the International Court of Justice ruled whether it was competent to deal with the Anglo-Persian oil dispute. On July 22, 1952, the Court by nine votes to five decided that it could not consider the British charge that Persia violated International Law in nationalising the Anglo-Iranian Oil Company's 500 million pound sterling Persian properties. The Court accordingly ruled that it was not competent to deal with the Anglo-Persian oil dispute and rejected Britain's complaint against Persia's nationalisation of the British owned oil industry.

Execution of Judicial Decisions.—This brings us to the question of execution of the decisions of the International Court of Justice. The Statute of the Court makes no provision for the enforcement of judicial decisions. All that Article 94 (2) of the Charter of the United Nations provides is that—

"If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

1. I. C. J. Reports, 1952, p. 93.

The provisions referred to above do not make it obligatory upon the Security Council to enforce the judgments of the Court against the recalcitrant party. They only indicate a procedure of appeal to the Security Council, which may either make recommendations or decide upon measures to be taken to give effect to the judgment. Now the recommendations of the Security Council require a majority of 9 (and before the amendment of Article 27, seven) members including the votes of the permanent members. In case the Security Council decides upon enforcement measures to give effect to the judgment of the Court, it may do so under Article 41 or 42 of the Charter. In order to give effect to its decisions, Article 41 empowers the Security Council to take measures not involving the use of armed force, which may include interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communications, and the severance of diplomatic relations. Article 42 comes into operation when the Security Council considers that measures provided for in Article 41 are inadequate and it may in that case take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, etc. Kelsen, however, observes that "in view of the fact that the Charter, in the case of non-compliance with a judgment of the Court, institutes a procedure of appeal, it is hardly possible to consider such non-compliance as a threat to, or breach of, the peace." "There is," observes Oppenheim, "room for clarifying Article 94 of the Charter so as to make the action of the Security Council mandatory and not merely permissive, and for amending the Charter so as to free the action of the Security Council in this respect from the shackles of the requirement of unanimity of its permanent members."2

Article 94 (2) suffers from ambiguity in its relationship with the rest of Charter. The Security Council may take recourse to force only if peace is threatened. Certainly not every act of non-compliance constitutes an imminent threat to peace. The matter has not been clarified by doctrine or practice. Unfortunately, applications for enforcement directives in the United Nations can be blocked. Directives from regional organizations have a higher probability of success. Certain organizations enjoy a general mandate to enforce, but have neither direct control over assets nor the capacity to acquire it. Effective power is primarily vested in states. These factors have reduced the judgment-enforcing authority of the International Court of Justice.

## Cases before the Court

1. The Corfu Channel Case. 3—On October 22, 1946, two British warships passing through the Strait of Corfu were struck with mines in Albanian territorial waters, with the result that H. M. S. Saumarez sank while H. M. S. Volage was scriously damaged. On the Channel being swept by the British navy on November 12 and 13 without obtaining the consent of the Albaninan authorities a newly laid field of anchored mines was discovered at the same place where had occurred the explosions in October. Great Britain alleged that All ania was responsible for the presence of the mines in the Channel.

On the dispute being referred to the International Court of Justice it found that the People's Republic of Albania was responsible under International Law for the explosions which occurred on October 22, 1946, in the Albanian waters, and for the damage and loss of human life resulting there-

Hans Kelsen: The Law of the United Nations, p. 541. Oppenheim: International Law, Vol. 2, p. 77.

ATSC. J. Raports 1949, p. 4.

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from on account of having failed to warn the British warships of the existence of minefield in its waters. This responsibility, according to the Court's opinion, rested on certain general and well-recognised principles, viz., elementary considerations of humanity, even more exacting in peace than in war, on the principle of the freedom of maritime communications and every State's obligation not to allow knowingly its territory to the used for acts contrary to the rights of other States. The Court further held that in accordance with well-recognised international custom, States in peace time have a right to send their warships through straits used for international navigation without the previous authorisation of a coastal State provided the passage is innocent unless provided otherwise in an international convention. right of innocent passage was held to imply an obligation on the territorial state not to permit its waters to be used in such a way as to cause damage to the interests of other States. This included, in particular, the duty to notify, for the benefit of shipping in general, the existence of any dangers to navigation of which it was aware. The Court further held that the United Kingdom did not violate the sovereignty of the People's Republic of Albania by reason of the acts of the British Navy in Albanian waters on October 22, 1946. It was also held that by reason of the acts of the British Navy in Albanian waters in the course of the operation of November 12 and 13, 1946, the United Kingdom violated the sovereignty of the People's Republic of Albania and that this declaration by the Court constituted in itself appropriate In the result Albania was held liable to pay £8,43,947 to the United Kingdom.

- 2. The Anglo-Iranian Oil Company Case.—The case has been discussed in this chapter earlier on page 478 ante.
- 3. Haya de la Torre's Case. Wictor Raul Haya de la Torre, a feruvian national and a political leader accused of having instigated a military rebellion, was granted asylum in the Colombian Embassy at Lima. On the matter being referred to the International Court of Justice, the Court observed that although the Havana Convention expressly prescribed the surrender of common criminals to the local authorities no obligation of the kind existed in regard to political offenders. It, however, reiterated its earlier view that asylum had been irregularly granted and that, although on this ground Peru was entitled to demand its termination, Columbia was not bound to surrender the refugee.
- 4. Anglo-Norwegian Fisheries Case.<sup>2</sup>—A Royal decree defining precisely the extent of the zone reserved for Norwegian fishermen on that part of the coast which extended from the Finish frontier to a point on the southern side of the opening of the Vestfjord was promulgated on the 12th July, 1935. The Government of the United Kingdom applied to the International Court of Justice on the 28th September, 1949, for declaring the principles of International Law which could be applied in defining base lines and by reference to which the Government of Norway was entitled to delimit a fisheries zone so as to reserve it exclusively for its own nationals. The Court held that the method employed for the delimitation of the fisheries zone by the Royal Norwegian Decree of the 12th July, 1935, was not contrary to International Law and that the base line fixed by the said Decree in application of this method was not contrary to International Law. The Court

I. C. J. Reports 1951, p. 71.
 I. C. J. Reports 1951, p. 116.

further held that Norway like all other States .was entitled to determine not only the breadth of her territorial sea but also the manner in which it was to be reckoned in accordance with the general principles of the existing law of nations.

5. Case concerning the Rights of Nationals of the United States of America in Morocco.-On the 28th October,:1950, the French Government sought a declaration before the International Court of Jutice that the nationals of the United States in Morocco were not entitled to any perferential treatment and were subject to the laws and regulations in force in Morocco, in particular, those relating to imports not involving an official allocation of currency.

The Government of the United States of America raised a preliminary objection that the provisions of the Residential Decree of December 30, 1948,

if applied to United States citizens, violated International Law.

The Court unanimously held that the Residential Decree was discriminatory in its nature as it exempted France from control of imports without allocation of currency and subjected the United States to such control. The rights which were conferred on the United States by the Act of Algeciras could not be taken away by the Residential Decree of December 30, 1948.

The Court further observed that the nationals of the United States were entitled to invoke the jurisdiction of the Consular Courts in matters provided for by the Act of Algeciras.

6. Ambatielos Case.-The Hellenic Government, having taken up the case of one of its nationals, the shipowner N. E. Ambatielos, on April 9, 1951, instituted proceedings asking the Court to declare that the claim made by Mr. Ambaticlos aganist the Government of the United Kingdom must, in accordance with the terms of the treaties concluded in 1886 and 1926 between Greece and the United Kingdom, be submitted to arbitration. The Government of the United Kingdom, on the other hand, contended that the Court had no jurisdiction to decide on that question.

Three Anglo-Greek agreements came up for consideration in this case, First, an 1886-treaty containing an arbitration clause which specified that disputes between the two parties which arose out of that treaty and could not be settled by negotiation should be submitted to an ad hoc arbitration tribunal. Secondly, a 1926-treaty which superseded the 1886-treaty provided that any dispute as to the interpretation or the application of its provisions should be submitted to the Permanent Court of International Justice. Thirdly, a 1926-declaration between the two States stated that disputes concerning the validity of claims on behalf of private persons based on the 1886-treaty should be settled according to the arbitration clause of that treaty.

In its preliminary objection, the United Kingdom asserted that the 1926declaration was independent of the 1926-treaty and, therefore, the Ambatielos dispute was not within the Court's jurisdiction. Greece, on the other hand, contended that the declaration was part of the 1926-treaty, and that the International Court was competent to decide the case on its merits.

On July 1, 1952, the Court by majority held that it was without jurisdiction to decide on the merits of the Ambatielos claim; and further held by by majority that it had jurisdiction to decide whether the United Kindom was under an obligation to submit to arbitration, in accordance with the declaration of 1926, the difference as to the validity of the Ambatielos claim, insofar as this claim was based on the treaty of 1886.

The Court delivered its judgment on the merits on May 19, 1953. The

Declaration of 1926, said the Court, related to a limited category of differences which the treaty of 1886 provided should be settled by arbitration, namely, differences as to the validity of claims on behalf of private persons based on the treaty of 1886. The Court concluded that the claim presented by the Hellenic Government was within the meaning of the 1926-Declaration, Consequently, by 10 votes to 4, the Court held that the United Kingdom was under an obligation to submit to arbitration.

7. Nottebohm Case (Liechtenstein v. Guatemala).—This case was submitted on December 10, 1951, by an application fild by Liechtenstein against Guatemala, claiming damages in respect of various measures which Guatemala had taken against the person and property of Friedrich Nottebohm, alleged to be a citizen of Liechtenstein. The application referred to the declarations by which both parties had accepted the compusory jurisdiction of the Court.

Guatemala submitted a preliminary objection to jurisdiction, based on the fact that the declaration by which it had accepted the compulsory jurisdiction of the Court had been made on January 27, 1947, for a period of five years and had, therefore, expired on January 26, 1952. Liechtenstein, on the other hand, relied on Article 36, paragraph 6, of the Statute, which provides that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

In its judgment delivered on November 18, 1953, the Court said that in the absence of any agreement to the contrary, an international tribunal had the right to decide as to its own jurisdiction and had the power to interpret for this purpose the instruments which governed its jurisdiction. Although the Guatemalan declaration expired on January 26, 1952, the Court had previously been seized of the case. Since neither in its declaration nor in any other way had Guatemala indicated that the time limit provided for in its declaration meant that the expiry of the period would deprive the Court of jurisdiction to deal with the cases of which it had been previously seized, the Court must exercise its powers as they were defined in the Statute. Accordingly, the Court came to the conclusion that it had jurisdiction to deal with the claim of Liechtenstein. It unanimously rejected the preliminary objection and resumed the proceedings on the merits.

On April 6, 1955, the Court delivered its judgment on the merits of the case. Since Liechtenstein contended that Mr. Nottebohm was its national by virtue of the naturalization conferred upon him, the Court examined the necessary conditions for the naturalization of foreigners in Liechtenstein, as well as the practice of states concerning nationality. The Court pointed out that Mr. Nottebohm had always retained his family and business connections with Germany, and that there was nothing to indicate that his application for naturalization in Liechtenstein was motivated by any desire to disassociate himself from the Government of his country. On the other hand, he had been settled for 34 years in Guatemala, which was the centre of his interests and his business activities. There was thus the absence of any bond of attachment with Liechtenstien, but there was a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened.

For these reasons the Court, by 11 votes to 3, held the claid of Liechtenstein to be inadmissible.

8. Minquiers and Ecrehos Case.—On December 6, 1951, the Government of the United Kingdom filed with the Court the text of a special agreement concluded between that Government and the French Government, requesting the Court to determine whether the sovereignty over the islets and rocks of the Minquiers and Ecrehos groups belonged to the United Kingdom or to the French republic.

The two groups of islets in question lie between the British Channel Island of Jersey and the coast of France. The Ecrehos lie 3.9 sea miles from the former, and 6.6 sea miles from the latter. The Minquiers lie 9.8 sea miles from Jersey, and 16. 2 sea miles from the French mainland, and 8 miles from the Chausey Islands, which belong to France.

The United Kingdom and France each submitted relevant documents in support of its claim of sovereignty over those islets.

With regard to the Ecrebos in particular, and on the basis of various medieval decuments, the Court held the view that the King of England exercised his justice and levied his rights in those islets. The documents also showed that there was at that time a close relationship between the Ecrebos and Jersey. From the beginning of the nineteenth century, the connection became closer again because of the growing importance of oysters fishery.

With regard to Minquiers, the Court noted that in 1615, 1616, 1617 and 1692, the manorial court of the fief of Noirmant in Jersey exercised its jurisdiction in the case of weeks found at the Minquiers because of the territorial character of that jurisdiction. At the end of the eighteenth century and during the nineteenth and twentieth centuries, there were also facts which showed that Jersey authorities had in several ways exercised ordinary local administration in respect of the Minquiers during a long period of time. For a considerable part of the nineteenth century and the twentieth century, British authorities had exercised State functions in respect of the islets. The Court further found that the facts invoked by the French Government could not be considered as sufficient evidence of the intention of that Government to act as sovereign over the islets. In its judgment the Court unanimously found that the sovereignty over the islets and rocks of the Ecrebos and Minquiers groups, insofar as these islets and rocks were capable of appropriation, belonged to the United Kingdom.

9. Case concerning right of access of Portugal to certain territories of India.—In the case relating to the dispute with Portugal on the right of access of Portugal to certain territories in India, filed with the International Court of Justice on the 22nd December, 1955, India challenged the jurisdiction of the Court on four legal and two legal and factual grounds saying that Portugal violated Court procedure in the way she submitted her case and denying record of any rights of passage granted to Portugal in the past. On the 26th November, 1957, the International Court of Justice however rejected four of the six preliminary objections made by India to the Court's Jurisdiction to hear the case. Two of the objections were not decided upon that date but were left for consideration at a later hearing together with the merits of the case.

The Court in its judgement said that it was unable to accept the contention of India that Portugal, in filing its application on the 22nd December, 1555, did not act in conformity with the provisions of the Statute. The Court considered that, by the deposit of its declaration of acceptance of jurisdiction of the Court with the Secretary-General of the United Nations, the accepting State became a party to the system of the optional clause in relation to the order declarant states, with all the rights and obligations deriving from

Art. 36. The contractual relations between the parties and the compulsory jurisdiction of the Court resulting therefrom, were established. ipso facto, and without special agreement by the fact of the making of the declaration.

With regard to the first preliminary objection to the effect that the Portuguese declaration was invalid for the reason of the condition enabling Portugual to exclude at any time from the scope of that declaration any given categories of disputes by mere notification to the Secretary-General, the Court said that the words used in the condition, construed in their ordinary sense, meant simply that a notification under that condition applied only to the disputes brought before the Court after the date of the notification. No retroactive effect could thus be imputed to such a notification in this connection. The Court found that the condition in the Portuguese declaration was not inconsistent with the statute.

Dealing with the fourth preliminary objection, which was also concerned with the manner in which the application was filed, the Court said that India contended that having regard to the manner in which the application was filed, it had been unable to avail itself on the basis of reciprocity of the condition in the Portuguese declaration and to exclude from the jurisdiction of the Court the dispute which was the subject-matter of the application. The Court merely recalled what it had said earlier, in particular that the statute did not prescribe any interval between the deposit of a declaration of acceptance and the filing of an application.

On the third preliminary objection, which involved the absence of diplomatic negotiations prior to the filing of the application, the Court held that a substantial part of the exchange of views between the parties prior to the filing of the application was devoted to the question of access to the enclaves, that the correspondence and notes laid before the Court revealed the repeated complaints of Portugal on account of denial of transit facilities, and that the correspondence showed that negotiations had reached a deadlock. Assuming that Article 36, paragraph 2, of the statute by referring to legal disputes, did require a definition of the dispute through negotiations, the condition had been complied with.

In its fifth objection, said the Court, India relied on a reservation in its own declaration of acceptance which excluded from the jurisdiction of the Court disputes with regard to questions which by international law fell exclusively within the jurisdiction of the Government of India and asserted that the facts and the legal considerations adduced before the Court did not permit the conclusion that there was a reasonably argnable case for the contention that the subject-matter of the dispute was outside the exclusive domestic jurisdiction of India. The Court noted that the facts on which the submissions of India were lasted were not admitted by Portugal and that the question could not be examined at that preliminary stage without prejudging the merits. Accordingly, the Court decided to join the fifth objection to the merits.

Finally, in dealing with the sixth objection based on the reservation ratione temporis (exclusion by reason of time) in the Indian declaration limiting the declaration to disputes arising after the 5th February, 1930, with regard to situations or facts subsequent to that date, the Court noted that to ascertain the date on which the dispute had arisen it was necessary to examine whether or not the dispute was only a continuation of a dispute on the right of passage which had arisen before 1930. The Court having heard conflicting arguments regarding the nature of the passage formerly exercised was not in a position to determine those two questions at that stage, and accordingly it joined the sixth preliminary objection to the merits.

India's ad hoc Judge on the bench of the International Court of Justice in the dispute with Portugal, Mr. M. C. Chagla, Chief Justice of Bombay, High court, gave a dissenting judgment. Dealing with the substance of the dispute, he said that there were certain points which were beyond controversy. The first was that India has exclusive territorial sovereignty over the territory through which Portugal claimed a right of passage or right of transit. He thought it was equally indisputable that prima facie a State enjoying territorial sovereignty had the right to allow or prohibit a right of passage or transit through her territories to any other State, or to permit a right of passage or transit under such terms and conditions as she thought proper.

The Portuguese, he said, had claimed the right of transit between Daman and the Portuguese enclaves of Dadra and Nagar Aveli in order to maintain communications between Daman and the enclaves. When a State came to this Court claiming a right against another State, it must be a right which should be enforceable. It must be a right which if conceded by the Court would be given effect to by the defendant State. No Court would give a judgment which could not be carried out by the losing party. And the most surprising feature of Portugal's claim in this case was that if she were to succeed in her contentions, the judgment she would obtain from the Court could never be given effect to by India. If the Court were to declare that Portugal had a right of transit over Indian territory, from Daman to the enclaves, it would be impossible for India to know what the nature, extent or content of that right would be. Would Portugal be entitled under this right to transport a whole army from Daman to the enclaves in order to suppress the revolt which had taken place there? Would she be able to transport tanks and artillery and all the paraphernalia of modern arms and armaments? Would she be able to fly aeroplanes over Indian territory in order to bomb the enclaves in order to reduce them to subjection? Or would the right be confined to transit facilities to be given to diplomatic envoys or a small unit in order to maintain law and order ?

Decision on merits.—On the merits, the International Court of Justice giving its judgment on the 12th April, 1960, in Portugal's case against India, ruled that Portugal had a right of passage to her enclaves in India for private persons subject to India's regulation but no such right for armed forces. The Court found that India had not acted contrary to its obligations with respect to the passage of private persons. It overruled two preliminary objections of India and declared that it had jurisdiction in the dispute between the two countries.

In its application to the Court on December 22, 1955, Portugal asked the International Court to recognise its right of passage for civilians and armed forces between its territory of Daman (Portuguese Daman) on the Indian west coast and its enclaved territories in the interior, Dadra and Nagar Aveli, over which it had lost effective control. Portugal also asked the Court to adjudge that India should put an immediate end to the do facto situation, by allowing Portugal to exercise her right of passage.

India opposed the Portuguese application on the ground that the right of passage claimed by Portugal could not be allowed unless it was based on the express grant or specific consent of the territorial sovereign. India argued that the facts presented to the Court showed no such express grant or specific consent of the territorial sovereign as could place a limitation on the exercise of India's jurisdiction.

The Court found that Article 17 of the 1779-Treaty was valid but did not grant sovereignty to Portugal. Portugal had invoked the treaty as a basis

of its sovereignty over Dadra and Nagar Aveli and claimed that it had acquired soverignty from the Marathas under Article 17 of the treaty. India had contended that it was given by the Marathas as mere jagirs, under their own sovereignty for Rs. 12,000 and that they were later usurped by the portuguese. The Court observed that the Treaty of 1779 and the Sanads of 1783 and 1785 were intended by the Marathas to effect in favour of the Portuguese only a grant of a Jagir or Saranjam, and not to transfer sovereignty over the villages to them. The fact that the Portuguese had access to villages for the purpose of collecting revenue and in pursuit of that purpose exercised such authority as had been delegated to them by the Marathas could not, in the view of the Court, be equated to a right of passage for the exercise of sovereignty.

The situation underwent a change with the advent of the British as sovereign of that part of the country in place of the Marathas. The Portuguese held themselves out as sovereign over the villages. The British did not as successors of the Marathas, themselves claim sovereignty, nor did they accord express recognition of Portuguese sovereignty, over them. The Portuguese sovereignty over the villages was recognised by the British in fact and by implication and was subsequently tacitly recognised by India. As a consequence the villages comprised in the Maratha grant acquired the character of Portuguese enclaves within Indian territory.

Portugal claimed a right of passage to the extent necessary for the exercise of its sovereignty over the enclaves, without any immunity and subject to the regulation and control of India. It was common ground between the parties that the passage of private persons and civil officials was not subject to any restrictions, beyond routine control, during these periods. There was nothing on the record to indicate the contrary. The Court, therefore, concluded that, with regard to private persons, civil officials and goods in general there existed during the British and post-British periods a constant and uniform practice allowing free passage between Daman and the enclaves. This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court was, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the parties and gave rise to a right and a correlative obligation. The Court, therefore, held that Portugal had in 1954 a right of passage over intervening Indian territory between coastal Daman and the enclaves and between the enclaves, in respect of private persons, civil officials and goods in general, to the extent necessary, as claimed by Portugal, for the exercise of its sovereignty over the enclaves, and subject to the regulation and control of India.

As regards armed forces the Court concluded that during the British and post-British periods, Potuguese armed forces and armed police did not pass between Daman and the enclaves as of right and that, after 1878, such passage could only take place with previous authorization by the British and later by India, accorded either under a reciprocal arrangement already agreed to, or in individual cases. Having regard to the special circumstances of the case, this necessity for authorization before passage could take place constituted, in the view of the Court, a negation of passage as of right. The practice predicated that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It was argued that permission was always granted, but that did not, in the opinion of the Court, affect the legal position. There was nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation.

The Court was of the view that no right of passage in favour of Portugal involving a correlative obligation on India had been established in respect of armed forces, armed police, and arms and ammunition.

Having found that Portugal had in 1954 a right of passage over intervening Indian territory between Daman and the enclaves in respect of private persons, civil officials and goods in general, the Court next considered whether India had acted contrary to its obligation resulting from Portugal's right of passage in respect of any of these categories.

Portugal complained of the progressive restriction of its right of passage between Cctober 1953 and July 1954. The events that took place in Dadra on July 21 and 22, 1954, resulted in the overthrow of Portuguese authority in that enclave. That created tension in the surrounding Indian territory. Thereafter all passage was suspended by India. India contended that that became necessary in view of the abnormal situation which had arisen in Dadra and the tension created in surrounding Indian territory.

In view of the tension then prevailing in intervening Indian territory, the Court was unable to hold that India's refusal of passage to the proposed delegation and its refusal of visas to Portuguese nationals of European origin and to native Indian Portuguese in the employ of the Portuguese Government was action contrary to its obligation resulting from Portugal's right of passage. Portugal's claim of a right of passage is subject to full recognition and exercise of Indian sovereignty over the intervening territory and without any immunity in favour of Portugal. The Court was of the view that India's refusal of passage in those cases was, in the circumstances, covered by its power of regulation and control of the right of passage of Portugal.

In the result the Court by eleven votes to four found that Portugal had in 1954 (i. e., before the successful insurrection of the people of Dadra and Nagar Aveli) a right of passage over the intervering Indian territory between the enclaves of Dadra and Nagar Aveli and the coastal district of Daman and between these enclaves, to the extent necessary for the exercise of Portuguese sovereignty over the enclaves and subject to the regulation and control of India, in respect of private persons, civil officials and goods in general; by eight votes to seven found that Portugal did not have in 1954 such a right of passage in respect of armed forces, armed police, and arms and ammunition; and by nine votes to six found that India had not acted contrary to its obligations resulting from Portugal's right of passage in respect of private persons, civil officials and goods in general.

The Soviet Judge of the International Court of Justice, Judge F. I. Kojevnikov, stated in a separate declaration on the Portuguese-Indian dispute that he could concur neither in reasoning nor the operative part of the judgement on the first and second points, for he was of the opinion that in this case the Court had no jurisdiction to examine and adjudicate upon the merits of the dispute. The Soviet Judge said that in his opinion "Portugal did not possess and does not possess any sovereign right over Dalra and Nagar Aveli territory to these regions and between each of them."

It will appear from the judgment of the International Court of Justice discussed above that the Court rejected the accusations made by Portu al against India and freed for ever Dadra and Nagar Aveli from Portuguese colonial rule. The Court spoke of the right of passage to non-military personnel across Indian territory but only subject to India's regulation and conse-

quently it repudiated the claim of any absolute right of Portugal following from sovercignty. The Gourt, however, specifically related the existence of even this restricted right to 1954, i. e., before the successful insurrection of the people of Dadra and Nagar Aveli. The logical implication of the Court's silence on the position in the changed context since then is that even this right is now extinct. Portugal wanted a declaration of the existence of a right today: the Court declined to do so. In his dissenting opinion the Portuguese Judge himself said: "Portugal...did not apply to the Court for recognition of a right it claimed to possess in the past. In its final Su bmissi ons of the 6th October, 1959, it asks the Court to adjuge and declare 'that the right of passage is a right possessed by Portugal and which must be respected by India'... Portugal did not institute proceedings merely in order to obtain moral satisfaction. It did so in order to secure recognition of an existing right, a right which it believes that it still possesses even though it admits that in certain circumstances its exercise might be held to be suspended."

On this the Court merely observed that "Portugal had in 1954 a right of passage, subject to the regulation and control of India, in respect of private persons, civil officials and goods in general; Portugal did not have in 1954 such a right of passage in respect of armed forces, armed police and arms and ammunition and that India had not acted contrary to its obligations resulting from Portugal's right of passage in respect of private persons, civil officials and goods in general.

Some Judges categorically stated that Portugal's limited right of passage in respect of private persons, civil officials and goods in general must be deemed to have been suspended or extinguished as a result of the events in Dadra and Nagar Aveli in 1954. The Uruguayan Judge Mr. Justice Armand-Ugon observed that the changes which had occurred in the enclaves affected the causes which gave rise to the right of passage and must naturally have their effect on the right of passage itself or on the ways in which it might be exercised. These new facts must lead to holding either that the right which had been recognised must be suspended or that it had become extinguished. In either case, it must be concluded that the passage claimed must be regarded as incapable of exercise in the present situation. Judge Spiropoulos of Greece remarked that after the departure of the Portuguese authorities, the population of the enclaves set up a new autonomous authority based upon the will of the population. Since the right of passage assumed the continuance of the administration of the enclaves by the Portugusse, the establishment of a new power in the enclaves must be regarded as having ipso facto put an end to the right of passage.

Judge Quintana of Argentine went to the length of disapproving Portugue se claim on the ground of his refusal to reimpose colonial rule on people who had freed themselves. To quote his words:

"To support the Portuguese claim in this case, which implies survival of the colonial system, without categorical and conclusive proof is to fly in the face of the United Nations Charter.

"A judge of its own law—the United Nations Charter—and judge of its own age—the age of national independence...the International Court of Justice cannot turn its back upon the world as it is. 'International Law must adapt itself to political necessities,' said the Permanent Court of Arbitration. That is the reason why the Charter made legal provision to cover the independence of non-self-geverning territories."

10. Monctary Gold Case.—On the 19th May, 1953, the Government of Italy filed an application before the International Court of Justice against France, the United Kingdom and the United States concerning the monetary gold removed from Rome in 1943.

The facts were these: The Germans having seized a certain amount of monetary gold in Rome transferred it to Germany. The gold belonged to the National Bank of Albania. The Final Act of the Paris Convention on Reparation, signed in 1946, by eighteen states, including the United States, France, the United Kingdom and Albania, and to which Italy subsequently adhered, provided that monetary gold found in Germany should be pooled for distribution among the countries entitled to participate in the pool in proportion to their respective losses of gold as a result of looting by Germany. France, the United Kingdom and the United States were responsible for that distribution. The three Governments confronted with competing claims by Albania and Italy requested the opinion of an arbiter, and at the same time declared that if the finding of the arbiter should be in favour of Albania, the gold would be delivered not to Albania but to the United Kingdom in partial satisfaction of the judgment in 1949, in the Corfu Channel case.

The Italian Government instead of presenting its memorial on the merits questioned the jurisdiction of the Court to adjudicate upon the first question relating to the validity of the Italian claim against Albania. The Court observed that it was unusual that an applicant State should challenge the jurisdiction of the Court. But on going through the objection, it noted that the first submission in the Italian application centered around a claim by Italy against Albania, a claim to indemnification for an alleged wrong. In order, therefore, to determine whether Italy was entitled to receive the gold, it was necessary to determine whether Albania had committed any international wrong against Italy, and whether the re was an obligation on the part of Albania to pay compensation to Italy. To go into the merits of such questions would be to decide a dispute between Italy and Albania, and the Court could not decide such a dispute without the consent of Albania.

The Court found unanimously that, although Italy and the three respondent States had conferred jurisdiction upon the Court, that jurisdiction did not authorize it to adjudicate in the absence of the consent of Albania on the first claim submitted by Italy. That second claim was dependent upon the first claim in the application. The Court accordingly found, by 13 votes to 1, that inasmuch as it could not adjudicate on the first Italian claim, it should refrain from examining the second.

11. Case of the Norwegian Loans Issued In France.-On the 16th July, 1955, the Government of France instituted proceedings in the International Court of Justice by filing an application against the Government of Norway concerning certain Norwegian loans issued in France. According to the facts stated in the application the Kingdom of Norway issued between 1885 and 1907 on the French market a certain number of international bonds, made payable in gold or including a gold clause, which were held by French nationals. A royal decree of the 27th September, 1931, suspended the convertibility of notes issued by the Bank of Norway and since that date the service of the loans had been effected on the basis of the nominal amount of the coupons or of the repaid bonds by payment of Norwegian kroner only. When the French holders of the Norwegian gold conds bould not get the resumption of the service of the loans on the basis of the nominal amount in gold, the French Government intervened on behalf of its nationals, but the negotiations with 62

the Government of Norway could not bear fruit. The Norwegian Government also refused to refer the dispute to arbitration. In these circumstances the matter was referred to the International Court of Justice, and the Government of France asked for a declaration that the international loans issued by the Kingdom of Norway and by its state banks stipulated in gold the amount of the borrower's obligation for the service of the coupons and the redemption bonds and that Norway could only discharge its obligation by the payment of the gold value of the coupons and the redeemed bonds.

The Norwegian Government raised the preliminary objection that the subject of the dispute was within the domain of municipal law and not of International Law, and the French declaration of March 1, 1949, accepting the compulsory jurisdiction of the Court did not apply to disputes relating to matters essentially within the national jurisdiction. The Norwegian Government had no clause in its declaration similar to the French declaration, but both States had provided for reciprocity in their declarations.

The Court by its judgment of the 6th July, 1957, ruled that it lacked jurisdiction, holding that Norway was entitled to invoke that declaration on an equal footing with France in excluding the jurisdiction over disputes understood to be essentially within its national jurisdiction.

12. Case concerning the application of the Convention of 1902 governing the guardianship of infants.—On the motion of the Government of the Netherlands proceedings were commenced in the Court against the Government of Sweden on the 10th July, 1957, relating to the application of a Convention of 1902 governing the guardianship of infants. The Convention provided that in guardianship matters concerning children of a nationality different from that of the State in which they resided, the national law of the child in question should be applied. The Netherlands conteded that the placing of a child of Netherlands nationality who was living in Sweden but who had a Dutch guardian in the care of a Swedish family was contrary to the obligations of Sweden under the Convention, inasmuch as it deprives the Dutch guardian of her right to custody of the child and amounted to a rival Swedish guardianship.

The Court by its judgment delivered on the 28th November, 1958, dismissed the claim of the Netherlands. It held that the Convention of 1902 was intended only to regulate a conflict of law question, namely the guardianship law to be applied to a foreign infant, and did not remove a foreign child under guardianship from the general body of local law, such as laws on compulsory education, etc. The Court considered that the law on protective upbringing was a law of general application, such as one on compulsory education and applied to all children who came within its provisions in Sweden. Accordingly it held that the Government of Sweden had not violated its obligations under the Convention of 1902 in placing the child in question under the regime of protective upbringing.

13. Aerial incident Case (Israel v. Bulgaria).—An aircraft belonging to El Al Israel Airlines Ltd., which was making a scheduled commercial flight between Vienna and Lydda (Israel), having penetrated over Bulgarian territory without previous authorisation was shot down by Bulgarian military aircraft on the 27th July, 1955. Diplomatic correspondence or negotiations yielded no satisfactory results, with the result that the Government of Israel submitted the dispute to the International Court of Justice by Application filed on the 16th October, 1957.

Israel based the Court's jurisdiction on the Bulgarian acceptance of the compulsory jurisdiction of the Permanent Court of International Justice and on Article 36 (5) of the present Court's Statute which lays down that declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and is in accordance with their terms.

The Bulgarian Government objected to the jurisdiction of the International Court of Justice on the ground that Article 36, paragraph 5, of the Statute of the International Court of Justice is inapplicable in regard to the People's Republic of Bulgaria because the Declaration of August 12, 1921, by which the Kingdom of Bulgaria had accepted the compulsory jurisdiction of the Permanent Court of International Justice and which formed part of the Protocol of Signature of the Statute of that Court, ceased to be in force on the dissolution of the Permanent Court, pronounced by the Assembly of the League of Nations on April 18, 1946, and that Declaration was, therefore, no longer in force on the date on which the People's Republic of Bulgaria became a party to the Statute of the International Court of Justice; and it could not accordingly be regarded as constituting an acceptance of the compulsory jurisdiction of the International Court of Justice, by virtue of Article 36, paragraph 5, of the Statute of that Court.

On the 26th May, 1959, the International Court of Justice upheld by 12 votes to 4 the Bulgarian objection.

The League of Nations was dissolved by the Assembly on April 18, 1946, on the basis of Article 3, paragraph 3, of the Covenant. The final Resolution of the League Assembly of April 18, 1946, also dissolved the Permanent Court of International Justice. The States parties to the Statute did not subsequently participate, and the League failed to elect new Judges after the collective demission of January 31, 1946. The Court held that Article 36 (5) applies only to original Members of the United

The Court by majority also held that even though Article 36 (5) effected the transfer to the new Court of the compulsory jurisdiction of the old, it should not run against the firmly established rule of consent and added that that constituted a new obligation which was, doubtless, no more onerous than the obligation which was to disappear but it was nevertheless a new obligation. It further held that expired treaties or declarations of accession could not be revived as such, and there appeared to be force in the Bulgarian contention that a declaration could not wander about in the Land of Shades from 1945 to 1955 and then, by the touch of a magic wand, come to life.

**Advisory Opinions** 

1. Admission of a State to Membership in the United Nations. -During 1946 and 1947 many States were refused admission to the membership of the United of the United Nations mostly on account of the use of veto by the Soviet Union in the Security Council. In the case of the ex-enemy States of eastern Europe Soviet Russia suggested that (she would refrain from using her veto if other members of the Council allowed the applications of those States which had the support of the Soviet Government. On November

I. C. J. Reports, 1948, p. 57.

- 17, 1947, the General Assembly requested the International Court of Justice to give an advisory opinion on the question whether a member of the United Nations called upon to vote on the admission of a State to membership in the United Nations, could or could not make its consent to the admission dependent on the admission of other States to membership in the United Nations. The Cours by nine votes to six answered the question in the negative.
- 2. Competence of the General Assembly for the admission of a State to the United Nations. 1-On November 22, 1949, the General Assembly adopted a resolution requesting the International Court of Justice to give its advisory opinion on the question whether the General Assembly could by its own decision admit a State to the membership of the United Nations in case the Security Council failed to make the recommendation. The Court by 12 votes to 2 answered the question in the negative.
- 3. Reparation for injuries suffered in the Service of the United Nations.2-The United Nations Mediator in Palestine, Count Folke Bernadotte, while serving as the head of the truce team, was assassinated on September 17, 1948. The United Nations General Assembly thereupon submitted to the International Court of Justice for an advisory opinion the question whether in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has or has not the United Nations, as an Organization, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, and (b) to the victim or to persons entitled through him? The Court gave an affirmative answer to both parts of the question.
- International Status of South West Africa. 3-This case has been discussed in Chapter VIII on pages 98 and 99 ante.
- 5. Effect of Awards of Compensation made by the United Nations Administrative Tribunals.—On December 9, 1953, the General Assembly decided to request an advisory opinion from the Court on the question whether the Asseml ly had the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal in favour of a staff member of the United Nations whose contract of service had been terminated without his assent; it further asked the Court, should its reply to that question be in the affirmative, to indicate the principal grounds on which it could lawfully exercise that right.

Written statements were presented to the Court on behalf of the International Labour Organization, and on behalf of Chile, China, Ecuador, France, Greece, Guatemala, Iraq, Mexico, the Netherlands, the Philippines, Sweden, Turkey, the United Kingdom, and the United States.

In its opinion, delivered on July 13, 1954, the Court stated that the reply to be given to the first question depended on the Statute of the Tribunal, and on the Staff Regulations and Rules of the United Nations. After an examination of those texts, the Court found that the Tribunal was established as an independent and truly judicial body. The contracts of service were concluded between the staff member concerned and the United Nations

I. C. J. Roports, 1950, pp. 4-34.
 I. C. J. Reports, 1949, p. 174.
 I. C. J. Reports, 1950, p. 79.

represented by the Secretary-General. The judgment of the Tribunal, which was final and without appeal and not subject to any kind of review, had binding force upon the United Nations as the juridical person responsible for the proper observance of the contract of service. Since the Organization became legally bound to carry out the judgment and to pay the compensation awarded to the staff member, it followed that the General Assembly as an organ of the United Nations must likewise be bound. The General Assembly could always amend the Statute of the Tribunal and provide for the review of its awards; but, in the opinion of the Court, the Assembly itself in view of its composition and functions, could hardly act as a judicial organ, all the more so as one party to the dispute was the Organization itself.

Having further refuted other arguments put forward in support of the view that the General Assembly might be justified in refusing to give effect to the awards of the Tribunal, the Court, by 9 votes to 3, answered in the negative the first question submitted by the General Assembly, and declared that it was unnecessary for the Court to consider the second question.

6. Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa.—In the advisory opinion given on July 11, 1950, the Court stated that the Union of South Africa continued to have international obligations binding upon it in respect of the territory of South-West Africa and that the supervisory functions were to be exercised by the United Nations. That opinion was accepted by the General Assembly as a basis for supervision over the administration of the territory.

In 1954, a Committee of the General Assembly drafted sets of rules one of which, rule F, read as follows: "Decisions of the General Assembly on questions relating to reports and petitions concerning the territory of South-West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations."

On November 23, 1954, the General Assembly requested an advisory opinion from the Court on the following questions:

- 1. Whether the above-quoted rule F on the voting procedure to be followed by the General Assembly was a correct interpretation of the advisory opinion of the Court of July 11, 1950; and
- 2. If that interpretation was not correct, what voting procedure should be followed by the General Assembly in taking decisions on questions relating to reports and petitions concerning the territory of South-West Africa?

In its opinion delivered on June 7, 1955, the Court pointed out that the Assembly was primarily concerned with the question whether rule F corresponded to a correct interpretation of the tollowing passage from the Court's opinion of 1950. "The degree of supervision to be exercised by the General Assembly should not, therefore, exceed that which applied under the Mandate System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations." The words "the degree of supervision," said the Court, "related to the extent of the substantive supervision and not to procedural matters, such as the system of voting which was applicable in the time of the League of Nations. Consequently, rule F could not be regarded as relevant to the degree of supervision." The word "procedure" used in the second part of the passage in question referred to those procedural steps whereby supervision was to be effected; but the

voting system of the General Assembly was not in contemplation when the Court used those words. Moreover, in its opinion of 1950, the Court had said that the General Assembly derived its competence to exercise its supervisory functions from the Charter; it was, therefore, within the framework of the Charter that the Assembly must find the rules governing the making of its decisions in connection with those functions.

For those reasons, the Court was unanimously of the opinion that rule F corresponded to a correct interpretation of the opinion of 1950. The Court declared that since the first question had been answered in the affirmative, it was not necessary for the Court to consider the second question.

7. Admissibility of hearings of petitioners by the Committee on South-West Africa.—On December 3, 1955, the General Assembly, on behalf of the Committee on South-West Africa, requested an advisory opinion from the Court to decide whether it was permissible for the Committee to grant oral hearings to petitioners, and, if so, whether this would be consistent with the advisory opinion of the Court given on July 11, 1960.

The Court referred to its advisory opinion of 1950, in which it had declared that the obligations of the Mandatory Power continued unimpaired except that the supervisory functions formerly exercised by the Council of the League of Nations were now to be exercised by the United Nations. The obligations of the Mandatory Power could not be extended beyond those which had been obtained under the Mandates system. The General Assembly should also conform as far as possible to the procedure followed by the Council of the League.

Under the League of Nations, no oral hearings were at any time granted to petitioners. Nevertheless, the Council of the League, having established the right of petition and having regulated the manner of its exercise, had been, in the opinion of the Court, competent to authorize the Permanent Mandates Commission to grant oral hearings to petitioners, had it seen fit to do so.

In conclusion, the Court held that it would not be inconsistent with the opinion of 1950 for the General Assembly to authorize a procedure for the Committee on South-West Africa to grant oral hearings to petitioners who had already submitted written petitions, provided that the Assembly was satisfied that such a course was necessary for the maintenance of effective international supervision of the administration of the mandated territory.

- 8. Case filed by Ethiopia and Liberia against South Africa for declaration remandate over South West-Africa.—This case has been discussed in Chapter XXXII on page 391 ante.
- 9. Legal Consequences for States of the continued presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council resolution 276 (1970).—The International Court of Just ice in its advisory opinion on the Status of South-West Africa opined on the 21st of June, 1971, that it considered South Africa's presence in South-West Africa to be illegal and that it should withdraw from the territory immediately. The opinion, by 13 votes to two (the two Judges of Britain and France gave dissenting opinion) had been sought by the United Nations Security Council under Art. 96 (1) of the Charter. The General Assembly had passed a resolution in 1966 terminating South Africa's mandate over South-West Africa, granted to the former by the League of Nations fifty years ago. Before action on that

resolution, the Security Council wanted to arm itself with the World Court's advisory opinion on the issue. The Security Council seeking support for its efforts to force a South-African withdrawal, had asked the Court for its opinion on the legal consequences for States of the continued presence of South Africas in Namibia, notwithstanding the Security Council resolution No. 276 of 1970

The Court observed that South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it. It is therefore under obligation to withdraw its administration from the territory of Namilia. By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation. It also remains accountable for any violations of its international obligations, or of the rights of the people of Namilia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.

For the reasons given above, member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia. It will be for the competent international organs to take specific measures in this respect.

By 11 votes to four the Court advised that the U. N. members were under obligation to recognise the illegality of South Africa's presence there and the invalidity of its acts on Echalf of or concerning Namibia (South-West Africa) and to refrain from any acts, and in particular any dealings with the Government of South Africa, implying recognition of the legality of, or lending support or assistance, to such presence and administration.

10. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania.—The Peace Treaties of 1947 provided that Bulgaria, Hungary and Romania shall ensure to all persons under their jurisdiction the enjoyment of human rights and the fundamental freedoms without distinction as to race, sex, language or religion. It was provided that in case of dispute concerning the interpretation of the treaty, the matter was to be referred to the three Heads of Mission, i. c., U. S. S. R., U. K. and U. S. A. In case the dispute be not resolved by them within two months, the matter was to be referred to a Commission composed of one representative of each party and a third me mber selected by mutual agreement of the two parties, and on their disag reement to nominate a third member. The Secretary-General of the United Nations was to be requested to make the appointment. The decision of the majority of the members of the Commission was to be accepted by the parties as definitive and binding.

In April 1949, the General Assembly expressed deep concern at the grave accusations made against the Governments of Bulgaria, Hungary and Romania regarding the suppression of human rights and fundamental freedoms in those countries and drew the attention of these governments to their obligations under the peace treaties, including the obligation to cooperate in the settlement of all these questions. In October 1949 the Assembly referred four questions to the International Court of Justice for its advisory opinion.

On the question as to whether a dispute existed between the three States and certain allied and associated powers in accordance with the provisions of the peace treaties, the Court declared on the 30th March, 1950, that a dispute did exist. On the second question whether, if existed, the three States were obligated to nominate their representatives to the treaty commissions for the settlement of disputes-a procedure prescribed in the peace treaties to deal with such disputes-, the Court gave an affirmative answer. On the failure of these countries to comply with the Court's opinion and to nominate their representatives within the time limit set by the Court, on July 18, 1950, it answered the remaining two questions. It decided that the fact that the three countries had not complied with the Court's opinion did not authorize the Secretary-General to appoint the third member of each commission. In that view of the matter, the Court declared that the answer to the fourth question, viz., will a commission of , two members, one appointed by the Secretary-General, and the other by a party to the dispute, be competent to make a definite and binding decision was not necessary.

11. Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization.—The Assembly of the Inter-Governmental Maritime Consultative Organization on January 19, 1959, asked the Court for an advisory opinion on the question: Was the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, which was elected on the 15th January, 1959, constituted in accordance with the Convention for the Establishment of the Organization? The Court, however, formulated the question in the following manner: "Has the Assembly, in not electing Liberia and Panama to the Maritime Safety Committee, exercised its electoral power in a manner in accordance with the provisions of Article 28 (a) of the Convention of the 6th March 1948, for the I stablishment of the Inter-Governmental Maritime Consultative Organization?"

Article 28 (a) of the Convention provides that the Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas.

When the Assembly began to elect the members of the Committee for the first time, in January, 1959, it had before it a working paper prepared by the Secretary-General listing the names of Members with the figures of their registered tonnage, based on Lloyd's Register. These figures showed

Liberia third and Panama eighth. After debate, in which the United Kingdom urged that each of the eight places should be voted on separately, while Liberia (with Panama's support) contended that the eight members with gross registered tonnage, should be elected automatically, the \ssembly voted for each of the eight places taking up country by country those listed in the order of tonnage. Liberia and Panama failed of election.

The Court concluded, by 9 votes to 5, that the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, which was elected on the 15th January, 1959, is not constituted in accordance with the Convention for the establishment of the Organization.

From the terms of Article 28 (a) it is clear that the draftsmen deliberately contemplated that the preponderant control of the Committee was in all circumstances to be vested in the "largest ship-owning nations". control was to be secured by the provision that not less than eight of the fourteen seats had to be filled by them. The language employed - "of which not less than eight shall be the largest ship-owning nations"-in its natural ordinary meaning conveys this intent of the drafts nen.

This interpretation accords with the structure of the Article. Having provided that "not less than eight shall be the largest shipowning nations", the Article goes on to provide that the remainder shall be elected so as to ensure adequate representation of 'other nations' with an important interest in maritime safety-nations other than the eight largest ship-owning nations, "such as nations interested in the supply of large numbers of crews", etc., as contrasted with "the largest ship-owning nations". The use of the words "other nations" and "such as" in their context confirms this interpre-

The underlying principle of Article 28 (a) is that the largest shipowning nations shall be in predominance on the Committee. No interpretation of the Article which is not consonant with this principle is admissible.

The Court next considered the meaning of the words "the largest shipowning nations."

In order to determine which nations are the largest ship-owning nations, it is apparent that some basis of measurement must be applied. The rationale of the situation is that when Article 23 (a) speaks of "the largest ship-owning nations" it can only have in mind a comparative size vis-a-vis other nations owners of tonnage. There is no other practical means by which the size of ship-owning nations may be measured. The largest ship-owning nations are to be elected on the strength of their tonnage, the tonnage which is owned by or belongs to them. The only question is in what sense Article 28 (a) contemplates they should be owned by or belong to them.

The Assembly, when proceeding to elect the eight largest ship-owning nations under Art. 28 (a), took note of the working paper prepared by the Secretary-General of the Organization which embodies a list of the shipowning nations with their respective registered tonnages formulated on the 63

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basis of Lloyd's Register. Liberia and Panama, countries which were among the eight largest on the list, were not elected by the Assembly but countries which ranked ninth and tenth were elected.

The Court concluded that where in Article 28 (a) 'ship-owning nations' are referred to, the reference is solely to registered tonnage. The largest ship-owning nations are the nations having the largest registered ship-tonnage.

The Assembly elected to the Committee neither Liberia nor Panama, in spite of the fact that on the basis of registered tonnage, these two States were included among the eight largest ship-owning nations. By so doing the Assembly failed to comply with Article 28 (a) of the Convention which, as the Court has established, must be interpreted as requiring the determination of the largest ship-owning nations to be made solely on the basis of registerd tonnage.

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## CHAPTER XLII

ENEMY CHARACTER .

Enemy Character of Individuals.—The general rule is that subjects of the belligerent are endowed with enemy character on the outbreak of war. Neutrals as a rule do not acquire enemy character. The primary test as to an enemy person is that of his allegiance. There are, however, some exceptions to the general rule, which will be noticed hereafter. It may, however, be said that in the past there was great divergence of views between the British and American practice, on the one hand, and that of the Continental on the other. The former adopted residence or the test of domicile for determining the enemy character, while, according to the latter, the enemy character was determined according to nationality. The difference between the two views at the present moment is, however, not so acute and the Anglo-American rule has of late veered round the Continental view in a large measure.

Lawrence has very well summed up the category of persons deemed to be of enemy character in an ascending and descending scale, according to the degree in which the hostile character is impressed upon them which is as follows!:

- 1. First in order of importance come persons enrolled in the enemy's fighting forces. They are enemies to the fullest extent.
- 2. Then follow the seamen navigating merchant vessels of the enemy State or crews of the merchant vessels of the enemy. They occupy a position midway between the fighting forces and the civilian population. The Hague Convention of 1907 freed them from liability to be kept in captivity, if they would make a formal promise in writing not to undertake during the war any service connected with its operations.
- 3. Next come the persons who follow an army without directly belonging to it. Article XIII of the Hague Regulations respecting the Laws and Customs of War on Land mentions newspaper correspondents and reporters sutlers and contractors as falling within the above category. When detained, such persons are entitled to be treated as prisoners of war, provided that they, were in possession of a certificate from the military authorities of the army they were accompanying.
- 4. Persons domiciled in enemy country even though neutral by nationality acquire enemy character if they continue to remain in the enemy country even after the declaration of war for the purposes of trade.

Domicile, according to the British and American view, is governed by the intent of the parties and by the length of their residence. If the intention to live at a certain place is manifest, domicile is acquired as soon as residence commences. Long continued residence at a certain place also creates a domicile. These people by their continued residence in an enemy country after the war add materially to the resources of the country by the taxes they pay and thus increase the common stock of strength of the enemy for the prosecution of the war. They are, therefore, stamped with the enemy character.

1. Lawrence . The Principles of International Law, pp. 344-359.

- 5. Persons living in places held by the enemy merely as military occupant are regarded as enemies so long as the occupation lasts. On the cessation of hostile occupation, the inhabitants are treated as citizens and not as residents in enemy territory.
- 6. Persons domiciled in a neutral country having houses of trade in enemy country are also deemed to have acquired enemy character. Such persons acquire trade domicile and expose their goods connected with it to the risk of capture.

It might be mentioned here that persons who are enemy nationals do not necessarily acquire enemy character if they reside and carry on trade in a neutral State.

At the outbreak of war belligerents usually permit enemy subjects on their territory to depart within a certain time. Great Britain followed this practice both during the First and Second World Wars. Germany, however, prevented enemy subjects to depart at the outbreak of the war.

The general rule is that subjects of the belligerents are endowed with enemy character at the outbreak of the war, while nationals of a State not taking part in the war are considered to be neutral. The above rule will not hold true if the subjects of the neutral States render unneutral service to either belligerent or if they are domiciled in enemy country, thereby contributing their mite by pay nent of taxes and other means to the strength of the enemy. Article 18-b of the Fifth Hague Convention of 1907 provided, however, that neutral citizens residing in enemy territory and furnishing services to the enemy government in such matters as police or administration would not lose their neutral status through the performance of such services.

In The King v. Superintendent of Vine Street Police Station, Ex Parte Liebmann L(1916) 1 K. B. 268] the Divisional Court of the King's Bench Division declared Alfred Liebmann as alien ennmy in 1915, although he had resided in England since 1889 and had in 1890 obtained a discharge from his German nationality. It was held that he was, though no longer recognised as a German subject in his own country, in a privileged position and was not entirely divested of his rights as a natural-born German.

The American Frading with the Enemy Act of 1917 defined 'enemy' to mean (a) any individual, partnership or other body of individuals of any nationality resident within the territory of a nation with which the United States was at war; (b) the Government of any nation with which the United State was at war; and (c) such other individuals, or body or class of individuals being citizens or subjects of any nation with which the United States was at war.

The English Trading with the Enemy Act, 1939, defined 'enemy' with regard to individuals as 'any individual residing in enemy territory.'

The rule against trading with an enemy is considered as a belligerent weapon of self-protection and is aimed at crippling the resources of the enemy.

The principles regulating intercourse between residents of belligerent States are not part of International Law, but are part of the municipal law of every country. They are to a large extent supplemented and modified very often by Trading with the Enemy Acts and the rules, regulations and proclamations promulgated under the power conferred under such Acts.

The enemy character of a person under the English common law attaches to a person, irrespective of his nationality or his domicile, if he is living or residing in enemy territory or enemy occupied territory and the test is an bjective test depending upon facts. The occupation by an enemy must be an effective occupation with the intention to hold it as if by conquest. It must be total subjugation. The occupation should not be of the slighter character for military or strategical reasons, but of the more comprehensive nature. The enemy must have effective control, though provisional, and must treat it as a settled acquisition. If the occupation is in a fluid state, swinging backwards and forwards, the national character of the territory would not be altered.

The common law of England has established the doctrine of non-intercourse between residents in belligerent States during a state of war. In America however the prohibition against intercourse is confined to commercial intercourse.

In India, the procedural incapacity of an alien enemy to sue, i. e., to sustain a persona standi in judicio, is enacted in S. 83 of the Code of Civil Procedure, Act No. V of 1908.

On principle and on authority, when a creditor and his agent and the debtor are not across the line of war but in the same belligerent State and on the same side of the line of war, there is no reason for prohibiting the payment of a debt by the debtor and a receipt by the creditor. Payments made by an agent of a debtor to an agent of a creditor, where both the agents were living in the same enemy occupied territory, are valid and the payments must be upheld.1

Domicil.—The question of domicil was considered by Lord Stowell in The Harmony [(1800) 2 C. Rob. 322]. It was observed that time constituted the grand ingredient in determining domicil. It was frequently said that if a person came to a country only for a special purpose, that should not fix a domicil. But if the purpose was of a kind that might or did actually detain the person for a great length of time, then a general residence might grow upon the special purpose. After such a long residence the plea of an original special purpose could not avail; and it must be inferred that other purposes had intruded on the original design, and had thus impressed on the party the character of the country in which he resided.

Who is an enemy ?-Under the law in England the test of enemy character of a person is not nationality but residence or even living in enemy territory for whatever purpose it may be. It is not necessary that the person, even if he is a British subject, should have a domicile in the sense of the civil law, viz., the place of a man's permanent house, or even of an indefinite residence. If a person, whether a neutral or a British subject, lives in enemy territory even for purposes of business, he is treated in law as an "enemy subject". Of course what applies to enemy territory applies equally to enemy occupied territory. The test of enemy character has, however, been clearly laid down by Lord Lindley in Janson v. Driefontein Consolidated Mines, Limited2 where his lordship summarised the tests in these words:

"When considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war that is important. An Englishman carrying on business in an enemy's country is treated as alien

(1902) A. C. 484, 505. 66

Scethalakshmi Achi v. V. T. Veerappa Chettiar, I. L. R. 1952 Mad. 361.

enemy in considering the validity or invalidity of his commercial contracts: McConnell v. Hector. 1 Again, the subject of a State at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend on his nationality nor even on what is the real domicile, but on the place or which he carries on his business or businesses : Wells v. Williams,2 As olserved by Sir William Scott in The Jonge Klassina3, a man may have mercantile concerns in two countries, and if he acts as merchant of both he must be liable to be considered as a subject of both with regard to the transactions originating, respectively, in those countries. That he has no fixed counting house in the enemy's country will not be decisive": See also The "Portland".4

From this passage it is evident that the term "domicile" is used in a two-told sense; one is in relation to the person without reference to his commercial intercourse and the second is in regard to the place of business which is styled by Dicey as a "commercial domicile" of a person. In particular cases the two domiciles of persons may be the same, or may be different, but it is impossible to ignore the distinction. In Volume I Halsbury's Laws of England, Second Edition, (Lord Hailsham), at p. 447, it is stated that:

"An alien enemy is one whose Sovereign or State is at war with the Sovereign of England, or one who is voluntarily resident or who carries on .business in an enemy's country even though a natural-born British subject or a naturalised British subject."

In Soufracht (VIO case5 Viscount Simon L. C., defined a subject of a State at war with England as "a person of whatever nationality, who is carrying on business in, or is voluntarily resident in, the country" and he

pointed out at page 211:

The test of 'enemy character' is fundamentally the same whether the question arises over a claim to sue in our Courts, or over issues raised in a Court of prize, or over a charge of trading with the enemy at common law.

The test is an objective test, turning on the relation of the enemy power to the territory where the individual voluntarily resides or the company. is commercially domiciled or controlled. It is not a question of nationality or of patriotic sentiment."

In the same case Lord Wright, at page 219, stated:

"Before examining the relevant authorities I should explain that the test which has been taken of enemy character in English Law is not nationality, but domicile in the sense of settled residence or in the case of traders commercial domicile. Domicile in the strict legal sense is not necessarily relevant. Some of these cases were decided in the Prize Court, others in Courts of common law. However the right to sue or prosecute an action in Court, the right to claim to be exempt from seizure and condemnation in prize, the liability to punishment for the offence of trading with the enemy, all depend alike on whether the person has enemy character in what has been called the 'technical or territorial sense'. The test is objective and depends on facts, not on the person's prejudices or passions, his patriotism, or his determination to free his country whenever he can."

<sup>1. 3</sup> B. & P. 113; 6 R R. 724.

<sup>2. (1697) 1</sup> Raym. (Ld) 282. 3. (1804) 5 C. Rob 297, 302-3. 4. (100) 3 C. Rob. 41; 165 E. R. 378. 5. (1943) A. C. 203.

It follows from these authorities that the enemy character of a person under the English common law attaches to a person, irrespective of his nationality or his domicile, if he is living or residing in enemy territory or enemy occupied territory and the test is an objective test depending upon facts. The domicile of a person may be in the civil law sense or a commercial domicile, but is used in both cases in technical or territorial sense and not necessarily in the sense in which it is understood under civil law: Seethalakshmi Achi v. V. T. Veerappa Chettiar.

Enemy Territory.—The next question that arises is about the nature of occupation required for purposes of these rules to change the national character of a State to constitute an enemy occupied territory. An enemy territory is the area under the sovereignty of a power at war and of which it is the owner of the soil.

Section 15 (1) of the English Act contains the definition of "enemy territory", :

"Enemy territory means any area which is under the sovereignty of, or in the occupation of, a Power with whom His Majesty is at war, not being an area in the occupation of His Majesty or of a Power allied with His Majesty."

Sub-section 2 of S. (2) of the Defence of India Rules defines "enemy territory" in the same terms. According to this rule:

"Enemy territory" means:

(a) any area which is under the sovereignty of, or administered by, or for the time being in the occupation of, a State at war with His Majesty, not being an area in the occupation of His Majesty, or of a State allied with His Majesty."

The definition of 'enemy territory' in the Rules relates to three different areas: (i) an area which is under the sovereignty of a State at war with His Majesty, (ii) an area which is administered by a State at war with His Majesty (such as the mandated territories and (iii) any area for the time being in the occupation of a State at war with His Majesty. The last expression 'not being an area in the occupation of His Majesty or of a State allied with His Majesty' takes out of the definition an area in the occupation of His Majesty or even an area in the occupation of a State allied with His Majesty or even an area in the occupation of a State allied with His Majesty.

Occupation and Conquest.—Wheaton on International Law, Volume II, Sixth Edition, at page 780, points out the distinction between "occupation" and "conquest" in 'hese words:

"Further, just as invasion must be accompanied by certain essential conditions in order that it may be transformed into occupation, so much military occupation be accompanied by certain necessary conditions in order that it may ripen into conquest. Formerly the invader 'assumed the larger' rights of an occupant, and the occupant assumed the still larger rights of a conqueror. But

1. I. L. R. 1952 Mad. 361.

now there is a line of demarcation between these stages. Conquest or complete subjugation implies the permanent subjection of the occupied country to the sovereign of the occupying forces, with the intention that this teerritory shall be annexed to the dominions of the new sovereign and shall henceforth be considered as a constituent portion thereof; that is, conquest depends on 'firm possession' together with the intention and the capacity to hold the territory so acquired."

Effect of Occupation and Conquest .- When a friendly territory is temporarily occupied by the enemy, the sovereignty of the former government is no doubt suspended, but the said territory and its inhabitants do not acquire the enemy character. In the same way if the enemy territory is temporarily occupied by a friendly power, the said territory and its inhabitants do not divest themselves of the enemy character. Occupation, therefore, does not involve any complete change of nationality of local citizens. The transfer of allegiance is only temporary and lasts during the period of war or occupation,

The temporary occupation, is, however, different from subjugation or complete conquest, accompanied by annexation, for the latter is a permanent affair and completely transfers sovereignty. The result is that when a territory has been completely conquered and annexed, it automatically acquires the enemy or friendly character according as the conqueror is an enemy or friendly State.

Change of National Character. In The Gerasimo's case 1 Right Hon. T. Pemberton Leigh, afterwards Lord Kingsdown, observed as follows:

"The national character of a trader is to be decided for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of the trade, as a subject of the power under whose dominion he carries it on and, of course, as an enemy of those with whom that power is at war. Nothing can be more just than this principle; but the whole foundation of it is, that the country in which the merchant trades is enemy's country."

Now the question is, what are the circumstances necessary to convert friendly or neutral territory into enemy's territory? For this purpose, is it sufficient that the territory in question should be occupied by a hostile force, and subjected, during its occupation, to the control of the hostile power, so far as such power may think fit to exercise control; or is it necessary that either by cession or conquest, or some other means, it should, either permanently or temporarily, be incorporated with, and form part of, the dominions of the invader at the time when the question of national character arises?

It appears to their Lordships that the first proposition cannot be maintained. It is impossible for any Judge, however able and learned, to have always present to his mind all the nice distinctions by which general rules are res-

tricted ;..."

In order to establish the meaning of the term "dominions of the encmy", the Privy Council relied upon the opinion of Lord Stowell in the case of The Fama2 thus :

"In order to complete the right of property, there must be both right to the thing and possession of it; both jus ad rem and jus in re. 'l'his', he observes, 'is the general law of property, and applies, I conceive, no less to the right of

 <sup>(1857) 11</sup> Moo. P. C. 88, 96

<sup>(1804) 5</sup> C. Rob. 106.

territory than to other rights.' Even in newly discovered countries, when a title is meant to be established, for the first time, some act of possession is usual ly done and proclaimed as a notification of the fact. In transfer, surely, where the former rights of others are to be superseded and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such settlements, may be informed under whose dominion and under what laws they are to live."

It was pointed out later in the course of the judgment that the national character of a place is not changed by the mere circumstance that it is in the possession and under the control of a hostile force and that this principle was acted by the Lords of Appeal in the St. Domingo cases of the "Dart" and "Happy Couple", where the rule operated with oxtreme hardship. The same is the opinion of Lord Stowell in the Manilla 1 In order to further reinforce this conclusion the Judicial Committee relied on Donaldson v. Thompson2 opinion of Lord Stowell in the case of The "Bolletta".3

The rights under occupation, then, cannot be co-extensive with those of sovereignty. The rights acquired are due to the military exigencies of the invader, and consequently are only provisional. The local inhabitants do not owe the occupant even temporary allegiance; and the national character of the locality is not legally changed.

This view has long been adopted by British Courts. Thus in The Gerasimo's case,4 already referred to, the Privy Council pointed out that in order to convert a friendly or neutral territory into an enemy territory, it was not sufficient that the territory in question should be under hostile occupation and subjected to the control of a hostile occupation and subjected to the control of a hostile power; some additional element was necessary, e.g., cession or conquest, whereby the territory was incorporated with and made part of the dominion of the invader. This principle was adopted not only by the British Prize Courts, but also in the Courts of common law. Lord Stowell emphasized the distinction between a hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by lapse of time."

In the Sovfracht (VIO)5 case Lord Wright summarised the opinion of Lord Stowell after an examination of the decision in The Bolletta6 and The Hoop? in these words:

"It is, I think clear that in these and other like cases Lord Stowell's opinion was that a territory changed its national character and acquired that of the conqueror if there were effective subjugation and firm possession with the intention of keeping the conquest, even though in the event the dominion of the conqueror was temporary and even though there was not either formal annexation or cession. What had to be considered was the nature of the occupation. A mere occupation in the course of and for purposes of military operations did not change the national character. These were cases in prize in

 <sup>(1808)</sup> Edw. 1.
 (1808) 1 Camp. 429.

 <sup>(1809)</sup> Edw. 171.
 (1857) 11 Moo. P C. 88; 14 E. R. 628.

<sup>5. (1943)</sup> A C. 203. 6. (1809) Edw. 171. 7. (1799) 1 C. Rob. 196.

which the issue was enemy or not enemy, but the same test was applied in a different connection in The Folting.1

Marshall C. J. in Thirty Hogsheads of Sugar v. Boyle and others known as Thirty Hogsheads of Sugar case2 stated the principle thus :

> "Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and Government of them."

Viscount Simon L. C. expressed his view in proposition 4 in Soufracht (V/O)3 at p. 211 thus:

"If as a result of occupation, the enemy is provisionally in effective con trol of an area at the material time and is exercising some kind of Government or administration over it, the area acquires 'enemy character. Local residents cannot sue in our Courts and goods shipped from such an area have enemy origin : See Marshall C.J. in the Thirty Hogsheads of Sugar case (Bentzon v. Byole).4 If, on the other hand, the occupation is of a slighter character-for instance, if it is incidental to military operations and does not result in effective control the case is different, as in Cremidi v. Powell (The Gerasimo's case). I would adopt the observations of my noble and learned friend Lord Wright on this decision for I agree that, while Dr. Lushington's statement of the law went too far in one direction, Lord Kingsdown (then the Right Hon. Thomas Pemberton Leigh) in delivering the judgment of the Privy Council reversing the decision of the Prize Court, in one passage went unnecessarily far in the other. In the present case, the occupation of Holland by Germany is plainly, as things stand, of the more absolute kind."

The essence of the two views, as already stated, is that the occupation must be an effective occupation with the intention to hold it as if by conquest. It must be total subjugation.

It has been authoritatively decided by the Court of Appeal in England in Robson v. Premier Oil and Pipe Line Co.5 that the prohibition of common law of intercourse with an alien enemy is not limited to commercial intercourse and the view of Gray J. in Kershaw v. Kelseye was dissented from. The opinion of Lord Stowell in The Hoop? and The Cosmopolite8 and that of the President of the Probate Division in The Panariellos have been taken in England as establishing the wider prohibition of intercourse and the basis of the prohibition is stated by Pickford L. J. in unambiguous terms thus:

"The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction."

- (1814) 1 Dnd. 450.
- 2. (1815) 9 Cranch 191.
- 3. (1943) A. C. 203.
- 4. (1815) 9 Cranch, 191-195; (1857) Moo. P. C. 88. 5. (1915) 2 Ch. 124. 6. 100 Mass. 561. 7. 1799) 1 C. Rob. 196. 8. (1801) 4 C. Rob. 8.

- 9. (1915) 84 L. J. Pro. 140.

All kind of intercourse, therefore, according to the English common law, whether commercial or otherwise, is inconsistent with a state of war between two belligerent countries and is therefore absolutely forbidden. It need not be citablished that, in fact, there was intercourse with enemy. It is enough if there is a possibility of intercourse. This decision was approved by the House of Lords in Ertel Bieber & Co. v. Rio Tinto Company.

Executory Contract.—It follows as a corollary of the principle of prohibition of intercourse that an executory contract which either involves intercourse or whose continured existence must in some way operate against public policy is abrogated as a result of war. Of course, it is not permissible during a state of war for residents of belligerent states to enter into contracts. Such contracts are prohibited by law. The law interferes with executory contracts by dissolving them. Lord Dunedin, in Ertel Bieber & Co. v. Rio Tinto Company enunciated the principles relating to this matter thus:

"The proposition of law", says the learned Lord, "on which the judgment of the Courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance, require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or any one voluntarily residing in the enemy country. I use the expression 'often phrased commercial intercourse' because I think the word 'intercourse' is sufficient without the epithet 'commercial."

The learned Lord, dealing with the effect on contracts, says that war does not avoid all contracts between subjects and enemies and that accrued rights are not affected though the right to sue in respect thereof is suspended. Another exception recognised is in the case of contracts which are really concomitants of rights of property, which even if executory are not abrogated. The executory cont act which is abrogated must involve intercourse or its continued existence must in some way be against public policy.

As pointed out by I ord Wright in Sovfracht  $(V|\mathcal{D})$  case<sup>2</sup> persons residing in enemy territory, so long as the enemy occupation lasts, are on the wrong side of the line of war and therefore they are shut off from communication and intercourse and from commercial dealing in the same manner and to the same extent as if they were original enemies such as the nationals or residents in the enemy territory. The learned Lord says in this case:

"This rule is only concerned with relations across the line of war. So far as concerns the internal commerce and ordinary activities of those in the occupied territory, such as those activities which the Master of the Rolls enumerates, the rule has no application, even though these activities go to promote the advantage of the German State and strengthen its war effort."

Both Lord Wright and Lord Porter agree that the agency of the solicitor in that case to act on behalf of his client who was an enemy subject terminated with the enemy occupation of the territory. Lord Porter states the rule to be:

"Ordinarily, when the principal becomes an enemy the authority of the agent ceases on the ground that it is not permissible to have intercourse with an enemy alien, and the existence of the relationship of principal and agent necessitates such intercourse."

<sup>1. (1918)</sup> A. C. 260. 2. (1913) A. C. 203.

It may, therefore, be taken that, so far as the English common law is concerned, the principle of abrogation of agency when either the principal or the agent becomes an alien is firmly established notwithstanding the view expressed in the earlier decision.1

The intercourse prohibited is across the line of war, and the common law of England, which of course cannot apply to the enemy country, does not and cannot prohibit intercourse or internal commerce and ordinary activities of these in the enemy occupied territory inter se, so long as they are on the same side of the line of war, even if such activities and such trade have the effect of conferring an advantage upon the enemy and strengthening his war effort.

The American law takes a more liberal view regarding the effect of war on the relationship between a principal and agent, particularly with reference to the collection of debts. In Kershaw v. Kelsey2 Gray J. of the Supreme Judicial Court of Massachusetts said :

"When a creditor, although a subject of the enemy remains in the country of the debtor or has a known agent there authorized to receive the amount of debt throughout the war, payment there to such creditor or to his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy, in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to the principal in the enemy's country, if he should do so the offence would be attributable to him and not to the person paying him

Of the two fundamental principles of the common law of England which have been under consideration till now in India, the procedural incapacity of an alien enemy to sue, i. e., to sustain a persona standi in judicio is enacted in S. 83 of the Code of Civil Procedure and has received statutory recognition. For the limitations therefore for the application of that principle, one has to look to the provisions of S. 33 of the Code of Civil Procedure. It seems to have been adopted and applied to India even under the Code earlier to the Code of 1882.

In Seethalakshmi v. Veerappa3, their Lordships of the Madras High Court after reviewing the decisions of the various English and American Courts observed that the House of Lords in Saufracht (VIO) case4 differed from the opinion of Lord Kingsdown in The Gerasimo's case5, a Privy Council case, on the question of the test to be applied to determine the change of nationality of territory. While Lord Kingdown took the view that it was necessary that for the territory, either by conquest, cession or annexation of a permanent or temporary nature to become part of the territory of the enemy there should be a formal declaration changing the national character of the territory, the House of Lords thought that effective control with a view to hold the territory in question by an establishment of civil and military administration would be sufficient to bring about a change of nationality of the territory. There is also a difference between the English common law and the law of the United States on the nature of the intercours: prohibited during the war. The English view is that all intercourse is prohibited, while in America the prohibition is restricted to commercial intercourse. Further, the House of Lords expressed a different opinion that the relationship of principal and agent

<sup>1.</sup> Seethalaksh mi v. Vecrappa, I. J., R. 1952, 361.

<sup>2. 100</sup> Mass 561

<sup>3.</sup> I. L. R. 1952 Mad. 361. 4. (1943) A. C. 203. 5. (1857) 11 Moo. p 88.

is ter minated by war for all purposes. While in America, if the creditor or his agent and the debtor reside on the same side of the line of war, that is in the enemy territory, there is no objection to payments of the debts to the creditor or his agent and interest on the debt is also not suspended.

According to the view of the Madras High Court the rigorous test of absolute prohibition of intercourse adopted in England is too severe a punishment for the person who has the misfortune of residing in an enemy occupied territory. Their lordships preferred the test laid down by Lord Kingsdown. As pointed out by Wharton, this principle itself is not followed in other countries than the Anglo-American countries. The object of prohibition being to prevent trade between residents of two belligernt States, it is unnecessary, in their opinion, to extend the prohibition beyond the necessary requirement. The Madras High Court adopted the opinion of Gray J. in the decision in Wuthrik v. David1 The view of the Supreme Court of the United States, in their opinion, is more in accordance with justice, equity and good conscience. Both on principle and on authority, it seemed to their lordships that when a creditor and his agent and the debtor are not across the line of war, but in the same belligerent State and on the same side of the line of war, there is no reason prohibiting the payment of the debt by the debtor and a receipt by the creditor. The decision of the House of Lords in Ottoman Bank v. Jebara2 seems to be consistent with the principl: recognized by the American Courts and adopted by the Bombay and Madras High Courts.

The character of a vessel as to whether she is enemy or neutral is determined prima facie by the flag she is authorized to fly. The Declaration of London (1909) confirmed this customary rule of International law.

Lawrence points out that a ship chartered by the enemy, or navigated by an enemy captain and crew, would be treated as enemy property, even though she belonged to a neutral owner, and the same fate would befall a neutral ship habitually sailing under the enemy's flag or taking pass or licence from the enemy.

The defect of the Declaration of London that the enemy or neutral character of a ship was determined by the flag she was entitled to fly came to light during World War I by the action of certain shipowners in the United States who, in order to circumvent the effect of the Declaration of London, purchased with German capital and operated under the American flag a number of merchant vessels, while the United States was still neutral. If the Declaration of London were strictly applied these vessels would have to be treated by Great Britain and France as neutral although they were enemy owned, wholly or in part. In order to meet this eventuality both the British and French Governments abrogated in 1915 their earlier order putting the Declaration of London into effect so far as that particular article, viz., Article 57, was concerned, and substituted in its place the rule that the enemy or neutral character of ships depended upon the nationality of the owners rather than the flag which they were entitled to fly. The action of the British and French Governments was severely criticised in some neutral countries, but, as observed by Garner in his book on International Law, it must be admitted that the rule of the Declaration which made the character of the ship depend

<sup>1. (1916) 31</sup> M. L. J. 860. 2. (1928) A. C. 269.



upon the nationality of its flag opened the door to fraudulent practice on an extensive scale.

The general rule, therefore, that the test for determining the enemy or neutral character of a ship is the flag she is entitled to fly, is now governed by certain exceptions, which are as under:

- 1. Enemy-owned vessels sailing under a neutral flag acquire enemy character if they are engaged in carrying military persons or despatches concurrently with other employment of an innocent character.
- 2. Neutral merchantmen acquire enemy character and lose their neutral character if they (i) take direct part in the hostilities, (ii) are under the orders or control of an enemy agent, (iii) are in the exclusive employment of the enemy or (iv) are being exclusively appropriated by the enemy for his own purposes.
- 3. Enemy-owned vessels flying a neutral flag or neutral merchantmen acquire enemy character if they resist legitimate exercise of the right of visit and search or capture.

Transfer of ships.—There was a great deal of discussion at the Second Hague Conference on the question of the right of shipowners to transfer their vessels to neutral registry before the outbreak of war in anticipation of hostilities, or subsequent to the outbreak of war, with a view to avoiding their capture by the enemy. A wide cleavage was noticed between the English and American views, on the one hand, and those of the French and Russians, on the other. English and American judicial opinion always regarded such transfers as valid when they were bona fide commercial transactions without any reservation on the part of the vendor. The French and Russian practice denied the right of a belligerent to capture and condemn enemy vessels transferred to neutral registers after the outbreak of war. As regards the transfers made before the outbreak of war it was agreed that a presumption arose about the validity of the transfer and the burden of proof that the transfer was made in order to avoid the capture by the enemy shifted on to the captor. If the transfer was made while the vessel was in transit or in a blockaded port with reservation of a right of repurchase, there is a presumption of invalidity which is almost absolute.

Under Convention VI of 1907 if a merchant ship of one of the belligerent powers was at the commencement of hostilities in an enemy port, it was allowed to depart freely, either immediately or after a sufficient period of grace, and to proceed, after being furnished with a pass, direct to its port of destination or such other port as was named for it. The same applied to ships which had left their last port of departure before the outbreak of war and entered an enemy port in ignorance of the outbreak of hostilities. (Art. 1).

If a merchant ship was unable owing to force majeure to leave, or was not allowed to leave within the period contemplated in Art. 1, it could be detained but was not to be confiscated (Art. 2). Article 3 dealt with the question of enemy ships which had left port before the commencement of war and which were found at sea in ignorance of the existence of hostilities. These, too, were not to be confiscated but could be detained and restored after the war without indemnity, or requisitioned or even destroyed on payment of compensation. Enemy cargo on board vessels coming within the preceding Article was to receive the same treatment as the ships.

Cargoes .- There existed still greater difficulty in determining the national character of the cargo carried by an enemy vessel. On the continent of Europe, France, Germany; Italy and other countries regarded the nationality of the owner irrespective of his domicile as the proper test. Great Britain, the United States, Japan and Holland, on the other hand, made the domicile of the owner the test of enemy or neutral character, so that goods owned by a neutral, residing and doing business in the enemy State, assumed enemy chaacter and were liable to capture. According to this view of Great Britainr and the United States, it proceeded that if the owner were domiciled in a neutral country, although of enemy nationality, his property was not deemed to be enemy property. The London Naval Conference (1908-09) was unable to reconcile the two conflicting views. Accordingly, it merely laid down that "the neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner" and left without any final opinion as to whether nationality or commercial do nicile was to determine the neutral or enemy character of the owner.

Neutral Goods on Belligerent Merchant Ships and Vice Versa.—
Great Britain followed the rule laid down in the Consolato del Mare, the
great maritime Code of the Middle Ages, which made the ownership of the
goods the test of liability to capture. Accordingly, neutral goods were exempted
from confiscation when carried upon enemy ships, but enemy goods were confiscated when carried upon neutral ships. The United States also followed the
traditional British rule except when there were treaty obligations to the contrary. The matter, was however, settled by the Declaration of Paris (1856) which
provided that the neutral flag covered enemy's goods with the exception of
contraband of war, and that neutral goods, with the exception of contraband
of war were not liable to capture under the enemy's flag. The Declaration
of Paris was signed in the first instance by seven powers and was subsequently
accepted by other nations; but the belligerents have observed it in all the subsequent naval wars, whether they were signatories or not.,

It will be pertinen to quote here the views of Pitt Cobbet from his Leading Cases on International Law, Vol. II, as they clinch the whole dispute with regard to the rule that neutral flag covers enemy goods. He says:

"By the extension of the term 'contraband' to cover all commodities of use, direct or indirect, in war, by the extension of the doctrine of continuous voyage and by the presumption of hostile destination, the rule that the neutral flag covers enemy goods except contraband of war, has been almost wholly nullified."

Enemy property.—All property belonging to the enemy State such as armed vessels of the enemy, guns and ammunitions of war of hostile character can be lawfully acquired, except works of art or other property unconnected with the war. There is no immunity from seizure with regard to public enemy-property lying on the territory of a belligerent, such as funds, rolling stock of enemy State, etc.

On land the property of enemy subjects is, as a general rule, exempt from capture. They are liable to seizure only if of a kind useful in war. But the needs of actual conflict may in some cases necessitate the destruction of buildings or the use of them as fortified posts. Movable property of the non-combatant population may not be seized unless they are arms, war material or appliances for the transmission of news and even in case of their capture they have to be restored at the conclusion of page. There is generally no con-

demnation of enemy property without a legislative enactment authorizing it. During the two World Wars Great Britain appointed custodians of enemy property with a view to preserve the same in contemplation of future agreements to be decided at the end of the war.

Belligerent property in a neutral State is immune from capture by an enemy State as the same enjoys protection of the former. A difficult situation, however, arose during the Second World War as Germany kept a substantial amount of looted property in netural countries, with the result that the Allied Powers prevailed upon such neutral countries as Switzerland and Sweden to conclude agre ments with a view to enable the former to seize German assets abroad. Oppenheim observes that such measures could not be regarded as purely confiscatory or contrary to properly conceived notions of public policy as it was "alien to the true purpose of neutrality to permit the use of neutral territory in such a wa as to facilitate looting and spoilation in a manner violative both of International Law and of considerations of humanity."

Corporation.—The enemy character of corporations is determined by the domicile. According to Pit Cobbett1 "the domicile of a corporation is the place where the brain which controls the operation of the company is situate. The brain of a corporation is said to be situate at the place where its irectors are accustomed to meet and formulate their policies. It is immaterial whether those persons who control the corporation are known as directors or not. The guiding factor is the domicile of the persons who control the destinies of the

company or direct its mode of action."

In the case of Daimler Co. I.ta. v. Continental Tyre and Rubber Co. Great Britain 1.1d.2, Lord Parker held that a company incorporated and registered in the United Kingdom but carrying on business in an enemy country was to be regarded as an enemy and that the character of individual shareholders could not of itself affect the character of the company. The facts, shortly stated, were that the Continental Tyre and Rubber Co. Ltd. was formed in 1905 with its registered office in London. Its directors were German subjects and, exceptting one, all the shares were held by a German company or the German naionals. The Contin ntal Tyre and Rubber Co. Ltd. brought an action to recover from the Diamler Co. Ltd., a sum of money. The latter pleaded that the former was an alien enemy and that they were restrained from making payment by the operation of the Trading with the Enemy Act, 1914. It was held by the House of Lords that the action did not lie.

Lord Parker, while delivering the judgment, laid down the following principles of law:

- 1. The enemy character may be assumed by a corporation if its agents or the persons in de facto control of its affairs are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies.
- A company incorporated in the United Kingdom could as such be neither friend nor enemy, yet such a company could only act through its agents and these might assume an enemy character in time of war when they were residents in the enemy country or were acting under the instructions of enemy shareholders.
- The character of individual shareholders cannot of itself affect the character of the company. It depends on the question whether the company's

Pirt Cobbett: Leading Cases on International Law, Vol. 2, p. 40 (Ed. V). (1916) 2 A, C. 307.

agents, or the persons in de facto control of its affairs, are in fact adhering to, taking instructions from, or acting under the control of enemies.

- 4. A company registered in the Unite Krlingdom, but carrying on business in a neutral country through agents properly authorized and resident here or in a neutral country, is prima facie to be regarded as a friend, but may, through its agents or persons in de facto control of its affairs, assume an enemy character.
- 5. A company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy.

As a general rule incorporation and the place where business is carried on are the two tests that determine the enemy character of a corporation. During the First World War as also during the Second World War England passed the Trading with the Enemy Acts of 1914 and 1939 prohibiting corporations resident in the United Kingdom from trading with any person resident or earrying on business in an enemy country or in territory in the occupation of the enemy and declared that enemy character attached to companies carrying on business in an enemy country wherever they were incorporated.

In The Unitas which was a whaling factory ship, registered in Germany and flying the German flag and having been captured in a German port by British forces in June 1945, after the German surrender, the two Dutch companies contended that they were the only stockholders in a German company controlled from Rotterdam and that The Unites had been registered in Germany under duress. The British Court (Probate, Divorce and Admiralty Division)2 ruled against the contention of the Dutch companies and condemned The Unitas as a lawful prize taken from the enemy and possessed of enemy character, holding that the nationality or enemy character of a ship was determined by its flag. On appeal, the Privy Council affirmed the condemna-tion of the vessel as a lawful prize taken from an enemy, holding that the flying of an enemy flag alone was in that case and in most cases sufficient to dispose of the matter at issue. Lord Porter observed that the building and registration of the whaling fleet in Germany were not involuntary in the sense of being unintentional : it was a deliberate choice taken between two distasteful alternatives. Their lordships accepted the view that there might be circumstances which made the flying of the enemy flag inconclusive as a reason for condemning a ship in Prize, but such circumstances must be very exceptional. They then cited the case of The Palme as being an instance of such inconclusiveness. There, it was a German ship purchased by the Swiss Red Cross from German owners, but both the Swiss and French governments refused to permit the Red Cross to use their flags, with the result that the vessel continued to fly the German flag for want of a more legitimate insigne. When The Plame was stopped by the British navy, the German flag was not treated as constituting conclusive proof of the vessel's enemy character.

In the case of a company incorporated in the United Kingdom, as stated in Volume I of Halsbury's Laws of England, at page 447:

"It does not become an alien enemy merely because its shares are held by alien enemies, but becomes an alien enemy if its agents or the persons in de facto control are alien enemies or if it carries on business in an enemy country: Daimler Company, Limited v. Continental Tyre and Rubber Company, (Great

<sup>1. 2</sup> All Eng. L. R. 219 (decided on May 8, 1950).

<sup>2 1</sup> All Eng. L. R. 421 (decided on February 20, 1948).

Britain) Limited 1. 'The same applies to a company incorporated in an allied State. A company incorperated in an enemy country is an alien enemy regardless of how its shares are held."

A company incorporated under the Laws of England and registered in England, and so having an English domicile and, by analogy, British nationality, does not cease by English law to be an English company subject to English law by reason of the fact that it is under enemy control. Enemy control may operate to the prejudice of an English company by conferring upon it enemy character, but it cannot confer upon it benefit so exonerating it from the operation of English law.2

X Incapacity of an alien enemy in English Law.—As discussed earlier, the test of an alien enemy is not only nationality but also residence. A British subject is an alien enemy if he resides and does business in an enemy country in wartime. An alien enemy is an alien friend if he resides in England and does business there in wartine under a licence from the Crown. Omitting such exceptions, an alien enemy cannot sue in England during wartime, but he can be sued and a writ served upon him or his agent in England. An action by an alien enemy if started before the war is suspended until the end of the war. The British Trading with the Enemy Acts of 1914 and 1931, however, amply previded for all such contingencies.

An alien enemy interned by the Crown was debarred from applying for a writ of haleas corpus and the Court had no power to grant it : R. v. Bottrill, Ex parte Kuechenmeister3,

By virtue of the Royal Prerogative, the Crown, acting through the Executive, has the right to intern, expel, or otherwise to control an alien enemy-according to its discretion. That right cannot be questioned or controlled in or by the King's Courts. The Court will, therefore, not entertain an application for a writ of habeas corpus at the instance of an alien enemy interned by order of the Executive : Rex v. Bottrill, Ex Parte Kuechenmeister. 1

There are two fundamental principles of English common law which are made applicable to enemy subjects in time of war. These principles though separate are closely connected, as the basis on which they are founded in common, as stated by Lord Wright in Soufracht (VO) case. These principles

"One is that he (enemy subject) is denied access to the English Courts; the other is that British subjects are prohibited from trading with him and from all intercourse or communication across the line of war. Both principles depend on rules of English municipal law, and both have their foundation in the ancient common law,"

<sup>1. (1916) 2</sup> A. C. 307.

Kuenigl v. Dennersmarck (1955) 1 Q. B. 515: 7 B. I. L. C., 1014.
 (1946) 1 All E. R. 635: 1 B. J. L. C. 9.

<sup>(1947) |</sup> K. B. 41 : | B. I. L. C. 11.

<sup>5. 1943)</sup> A. C. 203.

## CHAPTER XLIII

## LAWS OF LAND WARFARE

The laws of war, which had their origin in custom and convention, have undergone rapid changes in recent times. The preamble to the Hague Convention IV of 1907 declared "that populations and belligerents remain under the protection and rule of the principles of the Law of Nations, as they result from usages established between civilised nations, the laws of humanity, and the requirements of the public conscience." Modern war, however, is not a simple combat between the armies of rival parties. It is a total war, where the whole nation is turned into a war camp. exceeding a particular age-limit are compulsorily recruited in the army. Women take the place of men in factories, offices, railways and in tending the sick and wounded. The old distinction, between combatants and noncombatants, military and non-military objectives is no longer recognised. The object of the war, i. c., overpowering the enemy, is regarded sacrosanct and until that object is attained the belligerent uses every means necessary to accomplish the end. All rules of humane warfare are subordinated to the supreme task of winning the war. The Germans repeatedly during the two World Wars ruthlessly massacred civil population under the stress of military necessity. The use of atom Lomb by America during the last world war, in defiance of the protests of many of the scientists who had worked on the projects, was also a grave violation of the rules of International Law governing civilized warfare.

Geneva Convention, 1864.—In spite of the present tendency rules of civilized warfare have existed from times immemorial. On August 22, 1864, Switzerland, Belgium, Denmark, Spain, France, Italy, the Netherlands, Portugal, Prussia and most of the German States entered into an agreement, known as the Geneva Convention for the Amelioration of the Condition of Wounded Soldiers in Land Armies. The Convention acknowledged the neutral character of ambulances, military hospitals and the staff employed in hospitals.

St. Petersburg Declaration.—On the heels of the Geneva Convention came the St. Petersburg Declaration entered into between various nations in 1864 with a view to alleviating, as much as possible, the calamities of war. The Declaration recognized the right of the belligerents to weaken the military forces of the enemy or to disable the greatest possible number of men, but prohibited the employment of arms which uselessly aggravated the sufferings of disabled men or rendered their death inevitable. It prohibited the use of any projectile of a weight below 400 grammes, which was either explosive or charged with fulminating or inflammable substances.

Methods of Warfare.—The rules as to land warfare are broadly set out in the Conventions adopted in 1899 at the Hague, the Hague Convention IV of 1907 on the Laws and Customs of War on Land and, in particular, in the Regulations annexed to the Fourth Hague Convention of 1907, and in the Geneva Conventions of 1949.

Hague Convention, 1907.—Article 23 of the Hague Regulations respecting the Laws and Customs of War on Land, attached to the Conven-

tion, prohibited instruments of warfare of a destructive or painful character. It specially prohibited the use of poison or poisoned weapons and employment of arms, projectiles or material calculated to cause unnecessary suffering. The regulations forbade the discharge of projectiles and explosives from balloons and by other new methods of a similar nature. France, Germany, Italy, Russia and Japan, however, did not accept this clause.

The use of projectiles the sole object of which was the diffusion of asphyxiating and deleterious gases was also abstained. The United States delegation refused its signature. This rule was also grossly violated during the Great War of 1914-18; and when Germany used poison gas in that war, the Allied forces attempted to retaliate in kind on the ground of reprisal. By Article 5 of the Treaty of Washington (1922) U. S. A., the British Empire, France, Italy and Japan agreed to prohibit the employment in war of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices. The agreement, however, remained ineffective for want of ratification.

On June 17, 1925, the Geneva Gas Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, as well as of bacteriological methods of warfare, was signed by the United States delegate and the representatives of many States. The United States Senate, however, did not consent to its ratification. In December, 1966, the United States, however, endorsed a General Assembly resolution urging member States to abide by the Geneva Protocol.

It was also prohibited to use expanding (Dumdum) bullets.

Article 23 of the Hague Pegulations further forbade improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention.

Rules of stratagem falling under the expression "strategy" were restricted by the stipulation that they must not involve a violation of good faith. It was, therefore, forbidden to kill or wound treacherously individuals belonging to the hostile nation or army.

It was also forbidden to kill or wound an enemy who, having laid down his arms, or having no longer the means of defence, had surrendered at discretion.

Non-combatants were made exempt from personal injury, except in so far as it resulted incidentally in the course of the lawful operations of warfare or was inflicted as a punishment for offences committed against the invaders. Article 25 prohibited the attack or bombardment, by whatsoever means, of undefended towns, villages, dwellings or buildings. In the Great War of 1914-18, however, non-combatants were exposed to aerial bombardments and all arguments for immunity from personal injury to non-combatants disappeared when the alleged excesses of one belligerent were followed by reprisals by the other. In fact, military necessity in many cases did not permit a belligerent to protect the non-combatants from injury. When Germany invaded Belgium in 1914 it was subsequently thought essential to quell the inhabitants, who were resisting the German army, by whatever means possible and consequently no protection could be afforded to inon-combatants. In the Second World War, however, all rules providing immunity to non-combatants were discarded when even neutral city like Warsaw was ruthlessly bombarded besides London and other British cities by German

planes. As a reprisal the British and American fleet also carried on indiscriminate bombing of German cities, like Berlin, Munich, Hamburg and other industrial cities. "In the instantaneous obliteration of Hiroshima and Nagasaki the closure was applied to centuries of debate about the precise distinction between combatants and non-combatants."1

Article 23 of the Hague Regulations respecting the Laws and Customs of War on Land forbade a belligerent to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

Article 27 of the Hague Regulations prohibited the destruction of seizure of enemy's property unless such destruction or seizure was imperatively demanded by the necessity of war. Article 28 of the Regulations forbade the pillage of a town or place, even when taken by assault. The rule with regard to destruction or seizure of enemy's property in case of extreme necessity gave a long rope to unscrupulous belligerents. During the First World War the rules governing warfare were occasionally followed in breach -but only to a limited extent-when libraries and cathedrals were either burnt or destroyed. But, as Fenwick observes, "it remained for the Second World War to witness devastation on a scale which made mockery of the prohibitions of the Hague conventions. Enemy property of every character was seized without regard to its public or private character, Vast areas in Russia were laid waste in the path of the advancing German armies and even more in the wake of their retreat. Historic monuments were reduced to ruins in the invasion of one country after another."2 World War II saw a comprehensive ignoring of the provisions of Art. 27 of the Hague Regulations concerning the sparing of certain types of buildings. "Saturation and atomic bombing played no favourites and the nature of a given building was completely ignored. In addition, authenticated reports indicate that Germany, in particular, tended to locate genuine military targets near or mex; to an exempt building, hoping obviously that the military installation would benefit from the immunity of its neighbour. On the other hand, with one small lapse, the hospital-city character of Marburg, announced by Germany to the Allied armies and watched over by neutral observers as well as daily aerial inspection, was maintained scrupulously."3

Developments of the Laws of Land Warfare .- The developments of the laws of land warfare may be traced through the following general treatics :

- 1. The Geneva Convention of August 22. 1864, for the amelioration of the condition of wounded soldiers in armies in the field.
- 2. The Declaration of St. Petersburg of December 11, 1868, prohibiting the use in war of projectiles under 400 grammes charged with explosive substances.
- 3. The Hague Conventions of 1899 and 1907, concerning expanding (dumdum) Lullets, projectiles and explosives launched from balloons, projectiles diffusing asphyxiating or deleterious gases, concerning the opening of hostilities and concerning the rights and duties of neutral powers and persons in land warfare.

1. Smith: The Crisis in the Law of Nations, p. 86.

 Fenwick: International Law, Third Edition: pp. 567-68.
 Gerhard von Glahn: Law ↑ mong Nations, An Introduction to Public International Law, Second Edition, pp. 593-94. 68

- 4. The Protocol of 1925 concerning the use in war of asphyxiating, poisonous, and other gases.
- 5. The Geneva Conventions of 1929 concerning treatment of the sick and wounded and of prisoners of war.
  - 6. The four Conventions concluded at Geneva in 1949.

Geneva Conventions, 1949.—Four Conventions were concluded at Geneva in 1949 relating to (1) the Treatment of Prisoners of War; (2) the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; (3) the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; and (4) the Protection of Civilian Persons in time of War.

Prisoners of War.—With regard to prisoners of war they must be cared for and treated with humanity. The captor may employ private soldiers—not officers—in useful work, not in any way connected with the operation of the war. The work should also not be excessive. In all cases they must be paid for their work. Non-commissioned officers—under the Geneva Convention of 1949 are only required to do supervisory work, but they may ask for other work. According to the Hague Regulations of 1907, which provided in d tail in Arts. 4-20 for the humane treatment of prisoners, prisoners are to enjoy complete liberty of worship. They may be released on parole if the laws of the country permit that procedure. Prisoners caught in an attempt to run away may be shot in the last resort. If they are captured they may be punished. The Hague Conferences of 1899 and 1907 charged each belligerent with the task of establishing an information bureau in its territory and sending the necessary information to the government of the other belligerent after the termination of chostilities.

The Geneva Convention of 1929 also made provisions for the treatment of prisioners of war. As between the ratifying States this Convention replaced the Conventions of 1864 and 1906.

One of the Conventions concluded at Geneva in 1949 related to the treatment of prisoners of war, which applies to any armed conflict—recognized or unrecognized—arising between the contracting parties. The Convention came into force on October 21, 1950, and replaced for its ratifiers the earlier instruments dealing with the treatment of prisoners of war.

Under Article 4 of the Convention the following categories of persons are to be treated as prisoners of war:

- 1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- 2. Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions:
  - (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognisable at a distance;
  - (c) that of carrying arms openly;

- (d) that of conducting their operations in accordance with the laws and customs of war.
- 3. Members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Powers.
- 4. Persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorisation from the armed forces, which they accompany, who shall provide them for that purpose with an identity card.
- 5. Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of International Law.
- 6. Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

The Convention prohibits violence to life and person of prisoners, taking of hostages and humiliating or degrading treatment. No physical or mental torture is allowed to be inflicted on prisoners to compel them to give information. After capture they have to be removed from the danger area. Captivity may be terminated by repatriaton, accommodation in neutral countries, release, escape or death of the prisoner.

Repatriation of Korean War Prisoners .- In the Korean War the main obstacle to armistice was the repatriation of war prisoners. The Communists demanded wholesale repatriation of North Korean and Chinese prisoners of war to Communist territory on the basis of Articles 118 and 119 of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949, which provide for the unconditional handing over of the prisoners to the authorities on whose behalf they came to fight "without delay after the cessation of active hostilities." The United Nations negotiators objected to forced repatriation of unwilling prisoners to the Communists and contended that many prisoners on the Communists side came to fight the U. N. forces under compulsion and as such their forced repatriation was against all canons of justice and humanity and that the Geneva Convention - could not contemplate the extraordinary situation arising out of the conflict of ideology in the Korean War. In order to meet the conflicting viewpoints India introduced in the General Assembly's Political Committee a resolution in November 1952 which was a compromise between the l'ussian and western points of view by providing that the release of prisoners would be effected in accordance with the Geneva Convention but without the use of force either to prevent or to effect the return of prisoners. The resolution was passed by the United Nations General Assembly on December 3, 1952, by an overwhelming majority, but the Soviet Union voted against it on the ground that it did not offer a satisfactory solution. The truce agreement stopping three years' hostilities was, however, signed on July 27, 1953, and provided that prisoners not willing to return to their land would in the first instance be placed into the care of a neutral commission. The prisoners who were unwilling to return to North Korea or China were screened and dispersed after release, and about 14,000 Chinese soldiers were transferred to Eormosa by early 1954.

The United Nations appointed a special commission to examine the whole problem relating to prisoners that were still held by various Governments. The Japanese Government reported to the Commission in July 1951 that they had in their possession an enormous amount of reports and information brought back by the repatriated prisoners from Soviet-controlled areas showing how Japanese prisoners of war and civilians were detained in Liberia for years and made to lead a life of indescribable misery and hardship resulting in large number of deaths and that the number of prisoners unaccounted for varied between 340,000 and 370,000. In the case of the Japanese army captured in Manchuria, the Soviet Union could not assist in the repatriation of the bulk of the forces, and only a relatively small number, indoctrinated in Communist ideology, returned to Japan years after the end of the Second world war.

Pakistani Prisoners of War and their Repatriation.—The delay in repatriation of civilian internees and about 90,000 Pakistani prisoners of war imprisoned in India during the 1971 Indo-Pakistan war has assumed some importance. According to Article 132 of the Geneva Convention Relative to the Protection of Civilian Persons in time of war, "each interned person shall be released by the detaining power as soon as the reasons which necessitate his internment no longer exists." Each case of civilian internee, therefore, needs consideration on individual basis, but the prisoners of war fall breadly within a collective category.

Article 133 of the Convention relating to civilian internees provides that "interment shall cease as soon as possible after the close of hostilities." Article 134 calls on the detaining power to endeavour "upon the close of lostilities or occupation, to ensure the return of all internees in their last place of residence or to facilitate their repatriation."

As regards repatriation of war prisoners, Article 118 of the Geneva Conventions relative to the Treatment of Prisoners of War, 1949, states that "prisoners of war shall be released and repatriated without delay after cessation of active hostilities."

It will appear from the above that the provisions of the Geneva Convention lay emphasis on the release of civilian internees while in the case of military prisoners of war on their repatriation, and repatriation involves release and an almost simultaneous process of repatriation.

In the case of military prisoners of war the Geneva Convention does not enjoin automatic repatriation. The phrase "cessation of active hostilities" used in Article 118 of the Convention means not the suspension of hostilities in pursuance of an ordinary armistice which leaves open the possibility of a resumption of the conflict, but a cessation of hostilities so as to render a resumption of hostilities highly improbable. It is always a matter of negotiations and the question of repatriation will arise simultaneosuly with the conclusion of a peace treaty or the prospects of a durable peace in the sub-continent.

The aforesaid interpretation is borne out by historical precedents. Following the First World War, which ended on November 11, 1918, the repatriation of prisoners of war was delayed until the conclusion of peace, i.e., until after the Versailles treaty entered into force on January 15, 1920. This practice was governed by Article 20 of the Hague Regulations of 1907 which stipulated that "after the conclusion of peace, the repatriation of prisoners of war should be carried out as quickly as possible." The 1929 Geneva Convention also lays down that the repatriation of prisoners of war should be

effected as soon as possible "after the conclusion of peace." Even after the Second World War, prisoners of war were not repatriated immediately. They

were returned two or three years later despite the Geneva Conventions.

The Pakistani forces had in the eastern sector surrendered unconditionally to the joint command of India and Bangladesh forces; and if India had not showed sympathy to the prisoners of war by bringing them in India the Bengalis, in revenge of the atrocities committed by those prisoners innocent people in Bangladesh, would have made mincemeat of the P. O. W's. Pakistan has also to account for detaining some 400,000 war-stranded Bengalis. Pakistan itself has not satisfied the claims of international morality. And India cannot unilaterally repatriate the war prisoners who had surrendered to the joint Indo-Bangladesh command. Both India and Bangladesh have made it abundantly clear that the release of prisoners of war would require the consent of Bangladesh and their participation in any trilateral discussion. Since Bangladesh is a party to the question of return of the POWs to Pakistan, it is essential that trilateral discussion involving Pakistan, India and Bangladesh takes place, the two latter countries in their capacity as joint detaining power; and a tripartite meeting has not been possible on account of non-recognition of Bangladesh by Pakistan.

On April 17, 1973, India and Bangladesh offered Pakistan a package deal comprising simultaneous repatriation of the l'akistani prisoners of war, Bengalis forcibly detained in Pakistan and Pakistanis in Bangladesh; but even this reasonable proposal was not acceptable to Pakistan.

The Geneva Conventions of 1949 did not foresee the possibility of civilians being detained by belligerents, and India, cannot be said to have violated the Conventions so long as the detained Bangalee citizens are not permitted to

return to Bangladesh.

The Geneva accord envisages that the prisoners of war should not be released and repatriated until hostilities among the warring countries ceased. Pakistan has, however, been maintaining a most hostile attitude towards Bangladesh and, instead of finding an understanding with Bangladesh, Pakistan has kept alive fears in the sub-continent that the ceasefire is not a cessation of hostilities. The Bangladesh Prime Minister Sheikh Mujibur Rahman observed that Islamabad was continuing to call his country "Fast Pakistan" and had aspirations towards Bangladesh and was thus reasserting that hostilities were not over. This led to the conclusion that all the conditions for implementation of the Geneva Convention on Prisoners of War had not been fulfilled. Sheikh Mujibur Rahman added that while everybody was invoking the Convention and everybody showed his concern about the Pakistani prisoners of war, the same concern was not shown for the 400,000 struggling Bangalee civilians who were languishing in Pakistani prisons. Peace can be stabilised only with the participation of all the three countries-India, Bangladesh and Pakistan-and they alone can settle their mutual problems. But Pakistan was endeavouring to avoid the reality, and thought only about arms and not about the people.

Classes of persons having no claim to treatment of prisoners of war.-Sir Robert Phillimore enumerates the following classes of persons as having no claim to the treatment of prisoners of war :

1. Bands of marauders acting without the authority of the sovereign or

the order of the military commander.

2. Deserters, captured among the enemy's troops.

3. Spies, even if they belong to the regular army. The laws of war provide for the execution of spies when found by a commander within the lines of his army, or giving information of his plans and movements to the

Sick and Wounded .- The rules with regard to the sick and wounded were laid down by the Geneva Convention of 1864, which has already been referred to. They were subsequently modified at Geneva in 1906. The Hague Conference of 1907 accepted the obligations of belligerents towards the sick and wounded in land warfare. The sic and wounded combatants, according to the Regulations, were to be cared for by the belligerent without distinction of side or nationality. It was the duty of victorious commanders to protect wounded soldiers on the field from pillage or other maltreatment as also to collect all the personal belongings found on the persons of the dead and to forward those things to the authorities of the enemy's country for transmission to those interested. The Regulations further provided that it was the duty of the Government capturing the sick and wounded to feed and clothe them and treat them in these respects on alevel with its own troops. After the First World War the Convention of 1906 was supplemented by another Convention of 1929, which revised the existing rule regarding the treatment of the sick and wounded in armies in the field.

The Geneva Convention of 1864 was finally revised by an international conference at Geneva in the year 1949. The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 1949 provides that sick or wounded persons officially attached to armies must be respected, protected and cared for without distinction of nationality, sex, race, religion or political opinion. Article 36 of the Convention protects aircraft used as a means of medical transport for the time they are used in transporting medical personnel and material and evacuating wounded and sick. The Convention also provides for the possibility of establishing by agreement of the parties hospital zones for protecting the wounded and sick. Articles 15 and 16 relate to the treatment of the dead soldiers. They have made an obligatory provision for reciprocal and speedy communication by the belligerents of the names and identity of the wounded and dead and for collection and transmission of articles found on the battle-field or on the dead.

Ruses of War.—Ruses of war are stratagems employed with a view to misleading the enemy in its military operations. Article 24 of the Hague Regulations does not disallow the employment of ruses of war for the purpose of deceiving the enemy. Laying of ambushes and traps, the making of military operations, the feigning of attacks or withdrawals afford examples of legitimate ruses of war.

In this connection Oppenheim distinguishes stratagems from perfidy, inasmuch as the former are allowed but the latter is prohibited. According to Halleck, whether a belligerent has expressly or tacitly engaged, and is therefore bound by a moral obligation to speak the truth to an enemy, it is perfidy to betray his confidence, because it constitutes a breach of good faith. It is therefore prohibited to use a flag of truce, or the cross of the Geneva Convention with a view to employing the same for a strata cm. Stratagem may, however, be met with stratagem; and a spy of the enemy can be brilled for deceitul intelligence to his employer without breach of any recognised rule.

Stratagem and Deceit as understood in the Law of War.—According to Lawrence stratagems are ruses practised on the enemy in order to mislead him and put him off his guard. That they may be used at all is due to the fact that war is a conflict of wits quite as much as a conflict of arms. Article 24 of the Hague Regulations permits ruses of war and the employment of methods necessary for obtaining information about the enemy and the country as lawful. Stratagems that do not violate any express or tacit under-

standing between the belligerents are perfectly lawful and legitimate, as every general is expected to guard against them by his own vigilance and prudence.

Halleck, as already pointed out above, distinguishes betweeh 'stratagem' and 'deceit' which he calls perfidy by observing that whenever a belligerent has expressly or tacitly engaged, and is, therefore, bound by a moral obligation, to speak the truth to an enemy, it is perfidy to betray his confidence, because it constitutes a breach of good faith. Thus, for example, stratagems must not be applied where the enemy had been taken off its guard by any recognized signs, such as a flag of truce or the Red Cross emblems, of a desire to establish communication or to enjoy immunity from attack; nor should they be resorted to in connection with the carrying out of capitulations, which must be done to the letter; assassination of enemy generals, soldiers or heads of the states, as, also the feigning of surrender with the ultimate desire to entrap the enemy are all sheer perfidies and must not be looked upon as stratagems.

The laying of ambushes and traps, the concealing of military operations through false marches, erection of batteries, etc., the feigning of attacks or flights or withdrawals are examples of bona fide ruses of war. Use of pretended signals or the use of the enemy's watchword and giving wide publicity to deceitful intelligence are further examples of ruses of war. Troops engaged in actual conflict must not wear the uniform or carry the ensigns of the enemy. Article 23 of the Hague Regulations forbids belligerents from the improper use of the national fiag or of the military insignia or of the uniform of the enemy.

A stratagem may be retaliated by stratagem. Thus, as Lauterpacht observes, "if a spy of the enemy is bribed to give deceitful intelligence to his employer or if an officer, who is approached by the enemy and offered a bride, accepts it feigningly, but deceives the briber and leads him to disaster, no perfidy is committed."

### BELLIGERENT OCCUPATION AND COMME

Meaning of Occupation.—Occupation is completed by possession of the territory and establishing an administration over the same in the name of the occupying or acquring State. Occupation, therefore, differs from invasion, which is only a stage of conquest and does not involve the establishment of a government. Occupation also does not imply complete transfer of sover ignty, but connotes mlitiary authority subject to International Law. Article 42 of the Hague Regulations attached to the Fourth Hague Convention of 1907 declares that a territory is considered as occupied when it finds itself in fact placed under the authority of a hostile army and that such occupation is effective only when it is supported by a force sufficient to maintain the authority of the occupant. "Occupation is invasion plus taking possission of enemy country for the purpose of holding it, at any rate temporarily."

Lawrence points out that belligerent occupation implies, first, firm possession, so that the occupying power has the country under its control and can exercise its will therein, and secondly a continuance of the war so that the invader has not become the sovereign.<sup>2</sup>

Oppenheim: International Law, Vol. II, 7th Ed., p. 431.
 Lawrence: The Principles of International Law, p. 413.

Consequences of Occupation .- When a territory falls into the hands of an enemy, the political status of the inhabitants is changed. Wheaton has very succinctly summarised the position which may be quoted in extenso: "The sovereignty of their (inhabitants') former government is suspended, and their allegiance to it is, for the time being, dissolved. During the occupation they become subject to such laws as the conqueror may choose to impose ...... The inhabitants, however, cannot be required to take up arms against their own country. At the same time their private rights, and their relations to each other, unless specially altered by the conqueror, remain the same. Firm military occupation transfers all the rights of the displaced sovereignty to the victor, and he may, therefore, use the public property of the former as he thinks fit, and may appropriate to himself the rates and taxes due to it. But this is only the case so long as the occupation lasts ;...... If the district is retaken by its original sovereign, it reverts to the same state it was in before it was lost. The effects of military occupation are different with regard to movable and to immovable property. It gives the conqueror the right to acquire a complete title to movables, and to transfer them to any one he pleases, but it only gives him a qualified right over immovables. He may use real property as he pleases during his occupation, but if he sells it, the purchaser takes it at the risk of I cing evicted ly the original owner. It is only on the conclusion of peace that the invader's right over such property. become fixed." 1

Article 43 of the Hague Regulations declares that the occupant shall take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. An obligation is, therefore, imposed upon the occupying power to maintain the existing local laws in so far as they are compatible with the safety of the occupying forcest

The Hague Regulations forbid the occupant to compel the population of the occupied territory to take an oath of allegiance to the hostile power, but permit him to demand from them an oath of neutrality as also an oath to give the same obedience and loyalty-though temporary-as the lawful sovereign was entitled .to.

The occupant cannot compel the inhabitants of the occupied territory to give him information about their own troops

Institutions Dedicated to Worship .- Article 56 of the Hague Regulations expressly forbids the scizure or destruction of institutions dedicated to public worship, charity, education, science and art. Historical monuments and work of art or science are likewise to be protected. It is also provided that income derived from lands set apart for the support of establishments devoted to religion, charity, education, art and science are not to Le diverted from its beneficent purposes so as to augment the resources of the occupying army.

Immovable Property.-Lawrence,2 while dealing with immovables, points out that as a general rule they are held to be incapable of appropriation by an invader. They are bound up with the territory. The profits arising from them are free from confiscation, and the owners are to be protected in all lawful use of them (Art. 46)., But troops may be quartered in private houses though the inhabitants may not be ejected from their homes to make more room for the soldiery. Moreover, the needs of actual conflict may justify the destruction of buildings or the use of them as fortified posts.

Wheaton Elements of International Law, 3rd Ed., pp. 469-170.
 Lawrence: The Principles of International Law, p. 421.

if non-combatants fire upon the invading forces from their dwellings, or use them for the purpose of committing other acts of unauthorised hostility, th laws of war give to the belligerent who suffers, the right to inflict punishment by the destruction of the property in question, as well as by severities against the persons of the offenders.

Movable Property of Non-Combatants .- With regard to movable property of the non-combatant population of occupied districts Article 53 gives immunity from its seizure unless it consists of arms, war material, etc. Even in such cases they are to be restored at the termination of hostilities and indeponities paid for them.

Public Movable Property.-Article 53, paragraph 1, of the Hague Regulations, 1907, permits appropriation of movable State property by the occupying State. Private property, capable of being used for military purposes may, however, be seized under Article 53, paragraph 2, but must be restored and compensation fixed when peace is declared. Article 53 reads: An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for the operations of the war.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms and, generally, all kinds of munitions of war, may be sie, ac, even if they belong to private individuals but must be restored and compensation fixed when peace is made.

Private Property.—Private property has to be respected and cannot be confiscated (Art. 46). Further under Article 52 "requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military occupations against their own

Pillage of private property is strictly forbidden. The invader, however, can use neutral property found in the occupied territory on payment of proper

Article 54 provides that submarine cables connecting an occupied territory with a neutral territory are not to be seized or destroyed except in the case of absolute necessity. In the latter case, they are to be restored at the conclusion of peace, and indemnities paid for them.

The invader, under the Hague Regulations, can punish severely acts falling under war treason.

Operations of war.-Article 52 of the Hague Regulations forbids the occupant to compel the nationals of the hostile party to take part in the operations of war directed against their own country and the restriction is equally applicable even when they had been in his service before the commencement of war. The non-combatant inhabitants, however, can be forced to perform any service of non-military character. Non-combatants are prohibited under the penalty of death from hostile operation against the occupant, such as giving information to the enemy.

Collective penalty.—Article 50 lays down that no collective penalty,

pecuniary or otherwise, might be inflicted on the inhabitants for the acts of individuals for which they cannot be regarded as collectively responsible. This rule was followed in breach by Germany both in the Great War of 1914-18 and the World War of 1939-45 when that country imposed collective punishment on the inhabitants of the occupied territory in several cases.

Courts.—As regards the dispensing of justice civil courts continue to function during the period of military occupation according to old laws, but changes may be made in criminal law and procedure. Article 43 provides that the occupant must respect, unless prevented, the laws in force in the country, but he may set up military courts instaed of the ordinary courts. The courts, however, pronounce judgments in the name of the legitimate Government and not in the name of the occupant power. But the occupant may restrain them from announcing verdicts in the name of the legitimate Government, and in that case the courts may adopt a neutral formula and pronounce judgments "in the name of the law" as suggested by Bluntschli.

Requisitions, Contributions and Fines.—Requisitions are articles of daily consumption levied for the purpose of supplying the needs of the occupying army and are demanded from the inhabitants of the occupied territory. The Hague Regulations permit requisitions so far as they are required for the necessities of the army of occupation and are in proportion to the resources of the country. They can be demanded only on the authority of the commander in the locality occupied. They should be made in writing and receipts are to be given for the a rticles supplied.

Contributions are sums of money collected over and above the ordinary taxes. They are to be collected on the responsibility of the General in command under a written order and can be levied for the needs of the army as also to meet the expenses of the administration of the occupied territory. Contributions are permissible only when the yield from taxes is small and is insufficient to provide for the expenses of the administration. These must not be excessive, and the inhabitants must not be bled white. But the necessity to levy them for the needs of the army opens a new vista of exaction. Receipts are to be given to the contributories, although no provisions have been made for the repayment.

Fines are penalties levied upon a district as a punishment for some offence against the invaders committed by the inhabitants of that district. Article 50 of the Hague Regulations, as indicated above, declares that no general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which they cannot be regarded as collectively responsible.

Geneva Convention, 1949.—The ruthless atrocities committed by Germany as a belligerent occupant on the civilian population of the occupied territory during the Second World War necessitated the revision of the Hague Regulations and the adoption of the Geneva Convention of 1949. Articles 47 to 78 of the Convention relating to the Protection of Civilian Persons in time of War deal exclusively with occupied territories and are declaratory of existing provisions, though in some respects they go beyond the provisions of the Hague Regulations.

Under Article 49 individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the occupying power or to that of any other country, are prohibited. The Convention forbids the occupying power to compel the inhabitants of the occupied territory to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlishment is permitted.

The occupying power may not alter the status of public officials or judges in the occupied territories (Art. 54).

Destruction of real or personal property of individuals, of the State, or other public authorities is prohibited, except where such destruction is rendered absolutely necessary by military operations. (Art. 53).

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the occupying power in cases where they constitute a threat to its security. The penal provisions enacted by the occupying power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. (Arts. 64-65).

The death penalty may be imposed by the occuping power on a civilian inhabitant in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the occupying power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.

Protected persons shall not be arrested, prosecuted or convicted by the occupying power for acts committed or for opinions expressed before the occupation, with the exception of breaches of the laws and customs of war. (Art. 70.)

Article 55 casts a duty on occupying power of ensuring the food and medical supplies of the population.

The 1949 Conventions are additional to the Hague Regulations, and it is expressly so laid down in Art. 154 of the Geneva Conventions.

In the Justice case<sup>1</sup> it was stated that the laws of belligerent occupation apply only to an occupation during the course of actual warfare and that once the enemy has been totally defeated those laws do not apply to the ensuing occupation.

Military Occupation, Belligerent Occupation and Annexation.—
Military occupation is temporary de facto situation which does not deprive the occupied power of its sovereignty, nor does it take away its statehood. All that happens is that pro tempore the occupied power cannot exercise its rights. In other words, belligerent occupation means that the Government cannot function and authority is exercised by the occupying force.

Annexation, on the other hand, occurs when the Occupying Power acquires and makes the occupied territory as its own. Annexation gives a de jure right to administer the territory. Annexation means that there is not only possession but uncontested sovereignty over the territory. As Greenspan<sup>2</sup> put it, military occupation must be distinguished from subjugation, where a territory is not only conquered, but annexed by the conqueror.

- vi 34. United States v. Attstoctcer (1947) U.S. Military Tribunal, Nuremberg L. R 3 T.N.C.
  - 2. The Modern Law of Land Warfare.

There is however, a difference between true annexation on the one hand, and premature annexation, or as it is sometimes called 'anticipated annexation' on the other. Jurists regard annexation as premature so long as hostilities are continuing and there is an opposing army in the field even if the Occupied Power is wholly excluded from the territory.

Anticipated annexation by unilateral action is not true annexation. True annexation is only so when the territory is conquered and subjugated. (See Oppenheim: International Law (7th Edn.) pp. 846-847 (Vol. I), 566 (Vol. I), pp. 448/52 (Vol. II), 430-439 (Vol. II) and 599 et. seq. (Vol. II), Greenspan: (ibid pp. 215 et. seq. 600-603; Gould: Introduction to International Law, pp. 652- 656, 662-663; Brierly: Law of Nations, p. 155].

In Rev. Mons. Sebastiao Fransiscao Xavier dos Remedios Monterio v. The State of Goa1 the Supreme Court of India observed that the Conventions rightly lay down that annexation has no effect on the protection. But they speak of premature or anticipated annexation. Premature or anticipated annexation has no effect. Such a plea was negatived for the same reason by the Nuremberg Tribunal. In fact, when the Convention itself was being drafted the experts were half-inclined to add the word "alleged' before 'annexation' in Art. 47 to distinguish between annexation following conquest and subjugation and annexation made while hostilities are going on. Subjugation puts an end to the state of wr and destroys the source of authority of the existing Government. In subjugation, which is recognised as one of the modes of acquiring title, not only the de facto but also the de jure title passes to the conqueror, After subjugation the inhabitants must obey the laws such as are made and not resist them.

Thus the principle which is accepted is that the Occupying Power must apply the Convention even when it claims during conflict to have annexed the occupied territory. However, when the conflict is over and there is no hostile army in the field, annexation has the effect of creating a title to the territory.

The question, when does title to the new territory begin, is not easy to answer. Some would make title depend upon recognition. Mr. Stimson's doctrine of non-recognition in cases where a state of things has been brought about contray to the Pact of Paris was intended to deny root of title to conquest but when Italy conquered Abyssinia, the conquest was recognised because it was thought that the state of affairs had come to stay. Thus, although the United Nations Charter includes the obligation that force would not be used against the territorial integrity of other States (Art. 2, para. 4), events after the Second World War have shown that transfer of title to territory by conquest is still recognised. Prof. R. Y. Jennings poses the question: "What is the legal position where a conqueror having no title by conquest is nevertheless in full possession of the territorial power, and not apparently to be ousted?" He recommends the recognition of this fact between the two States. If cession after defeat can create title, occupation combined with absence of opposition must lead to the same kind of title.

In the present case Goa, which was a Portugese colony for about 450 years, was occupied by the Indian armed forces on December 19, 1961, following a short military action. The military engagement was only a few hours' duration and then there was no resistance at all. It is hardly necessary to try to establish title by history traced to the early day as was done in the Minquiers and Ecrehos case.2 Nor is there any room for the thesis of Dr. Schwarzenberger (A

 <sup>26</sup> th March, 1969
 1953 I. C. J. 47.

Manual of International Law, 5th Edn. p. 12) that title is relative and grows with recognition. True annexation followed here so close upon military occupation as to leave no real hiatus. The critical date of true and final annexation. was December 20, 1961, when the entire government and administration were taken over and there was no army in occuption and no army in opposition. The occupation on December 20, 1961, was neither belligerent occupation nor anticipated occupation, but true annexation by conquest and subjugation.

The Geneva Convention ceased to apply after December 20, 1961. In the present case, the Indian Government offered Rev. Father Monteiro Indian nationality and citizenship which he refused and retained his Portuguese nationality. As a Portuguese national he could only stay in India on taking out a permit. He was, therefore, rightly prosecuted under the law applicable to him.

#### CHAPTER XLV

### LAWS OF MARITIME WARFARE

Object.—The object of maritime warfare is to deprive the enemy of those means of communication which the high seas in their character as res nullius afford to every nation, to defeat the enemy navy and annihilate enemy merchant fleet. Unlike land warfare, meritime warfare permits capture of private property found on enemy vessels, neutral goods and ships employed in unneutral service and all goods of enemy found affoat unless protected by a neutral flag.

Apart from customs the laws of maritime warfare are mainly embodied in the Declaration of Paris (1856), and the Sixth Hague Convention of 1907, reference whereto has been made in Ch. XLII at p. 530 ante.

Declaration of Paris.—The Declaration of Paris (1856) formulated the following four principles:

- (1) That privateering is to be abolished.
- (2) That neutral flag covers enemy goods with the exception of contra-
- (3) That neutral goods, except the contraband of war, are not liable to capture under the enemy flag.
  - (4) That blockedes, to be real and binding, must be effective.

Attack on Public and Private Vessels of the Enemy.—As a general rule public and Private vessels of the enemy, says Lawrence, may be attacked and captured in their own ports and waters, in the ports and waters of the attacking power, and on the high seas, but not in neutral or neutralized ports and waters. The following, however, form exceptions to the general rule:

Exceptions.—1. Hospital ships— The Hague Conventions of 1899 and 1907 gave them immunity from capture, on the ground of their humanitarian

work. Such hospital ships were to be painted white and to fly the Geneva flag. It was, however, recognized that hospital ships must not hamper the movements of the combatants.

With the use of submarines by Germany hospital ships of the Allied Powers were in a number of cases attacked and sunk in the First World War. On a protest made by the Allied Powers Germany replied that hospital ships in many cases were indistinguishable and that they were also being employed for military purposes. Germany thereupon declared that hospital ships within a defined zone would be considered as belligerents and would be attacked without further consideration. Britain also issued a warning of reprisal. During the Second World War Japan also made a breach of the convention by attacking marked hospital ships, which resulted in deaths not only of wounded soldiers and sailors but also of surgeons and nurses engaged in relieving their suffering.

2. Vessels employed on religious, scientific or philanthropic missions are also immune from capture under Article 4 of the Eleventh Hague Convention of 1907. Such immunity is withdrawn if they take part in hostilities.

3. Cartel ships. They are vessels employed in exchange of prisoners and

are free from capture by belligerent powers.

4. Fishing smacks and market boats. They being small crafts engaged in coast fisheries or local trade are exempted from belligerent capture. But this exemption no longer applies when they take part in hostilities.

Enemy ships protected by licences are free from capture so long as they navigate or carry on trade according to the terms and conditions of the

licence.

- 6. The Sixth Hague Convention of 1907 conferred an incomplete and limited immunity on three classes of merchantmen :
  - (a) those who are found in an enemy port at the commencement of hostilities :
  - (b) those who enter such a port ignorant that war has broken out, and having left their last port of departure while peace still existed; and +
  - (c) those who are encountered on the high seas in the same condition of ignorance, and having sailed before the war began from the last port at which they had previously touched.

The Convention permitted the belligerent to detain a merchant vessel without payment of compensation with liability to restore it after the war. The belligerent could also requisition the vessel on payment of compensation With regard to ships which had left a port before the beginning of hostilities and were encountered on the high seas in the same state of ignorance, they were allowed to be destroyed in the alternative if compensation was paid and provision was also made for the ship's papers.

Scant respect was paid to the Convention by Great Britain, France, Germany and the United States during the First World War and the Second World War and vessels found in their ports or found on the high seas after the outbreak of war were freely interned, captured and operated without payment

of compensation.

Neutral Merchant Ships in Enemy Service.—The unratified Declaration of London, 1909, provides that "a neutral vessel will be condemned, and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel; (1) if she takes a direct part in the

hostilities; (2) if she is under the orders or control of an agent placed on board by the enemy Government; (3) if she is in the exclusive employment of the enemy Government; or (4) if she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy." (Art. 46).

Neutral Merchant Ships in Enemy Convoy.—The German-Greek Mixed Arbitral Tribunal observed in Kyriakides v. Germany (1928)<sup>1</sup> that the fact alone that the merchant vessel had put herself under the protection of enemy naval forces and that it made the journey in the company of one or several men-of-war was sufficient to assimilate her to an enemy man-of-war.

Bombardment of Coast Towns.—The Convention concerning bombardment by naval forces in times of war was adopted by the Second Hague Conference of 1907. Article I enacted that the bombardment of undefended ports, towns, villages, dwellings or other buildings by naval forces was under all circumstances and conditions prohibited and a place could not be bombarded solely because automatic contact mines were anchored off the harbour. Article 2 provided that, even in the case of undefended places, military or naval establishments, depots of arms or war material, workshops or plant capable of hostile use, and men-of-war in harbour might be bombarded, if the local authorities failed to destroy them on giving notice. The belligerent was also to spare as far as possible buildings devoted to public worship, art, science or charity, which buildings were to be indicated by prescribed visible signs. The Convention failed to define a defended port or town and the result was that the Convention was followed in breach during the two world wars.

Mines.—Convention VIII of the Hague Conference, 1907, prohibited the laying of unanchored contact mines unless they were so constructed as to brecome harmless within one hour after control of them had ceased. It also prohibited the laying of anchored contact mines that did not become harmless of getting loose from their moorings as also the use of torpedoes that did not become harmless after missing their mark. It further prohibited the laying of contact mines off the coasts and ports of the enemy for intercepting commercial navigation.

Submarines.—Upon the outbreak of the First World War German submarines destroyed merchant vessels, battle ships and even neutral vessels as by their very nature the submarines could not follow the traditional laws of naval, warfare. Submarines operate effectively by torpedoes. Although it is perfectly lawful for them to sink the warships of the enemy without any notice and also to visit, search and capture enemy merchant vessels, their chief defect, according to Prof. Hall, was their incapacity to provide for the safety of the persons on board the vessels which they sank, as well as the difficulty at times of distinguishing the character of the vessels they attacked.

With regard to armed merchant vessels it was argued by Germany that they could be attacked by submarines without any warning, as any warning or prior notice would expose the submarines themselves to grave danger. It was further contended that since the British Admiralty had ordered its officers or merchant ships in the First World war to attack submarines at sight, there was no occasion for issuing any warning. The matier came to a head when on May 7, 1915, the Lusitania, a British Altantic liner, was torpedoed by a German torpedo. She had nearly 2,000 passengers on board the vessel, most of whom were Americans. She sank immediately and about 1,200 persons lost their livs. America, who was by then neutral, addressed a strong protest to Ger-

<sup>1. 8</sup> M. A. T. (1929), p. 350.

many. The German Government contended that the Lusitania was not an ordinary unarmed vessel but an auxiliary cruiser, included in the navy list published by the British Admiralty and that it had on previous trips carried Canadian troops and also arms and ammunitions to help the Allies. As regards the argument advanced by the Allies that the Declaration of London, 1909, provided that the safety of those on board must first be provided for before a ship could be destroyed, Germany replied that the previously recognized rules of maritime warfare, had become obsolete by the emergence of submarines and as such, in the changed circumstances, they could not guarantee protection to noncombatants and passengers.

An attempt was made at the Washington Conference on the Limitation of Armaments in 1921-1922 to lay down rules with regard to submarines. The Conference decided that the existing rules of naval warfare applied to submarines and were deemed to be an established part of International Law, It expressed a general reaction against the exploits of German submarine during 1914-1918. It was also decided that if a submarine could not conform to those rules, it must desist from attacking the merchant vessel. The treaty embodying those declarations could not, however, be ratified by the States owing to the impossibility of submarines conforming to the laws of war. The Conference on the Limitation and Reduction of Naval Armaments held at London in 1930 reiterated the rules laid down at the Washington Conference. The same rules were incorporated verbatim in the London Submarine Rules Protocol of 1936. By 1939 thirty-six States had become parties to this Protocol.

In spite of all this the Second World War witnessed almost no binding rules with regard to submarines. The Nazi conception of total war reduced all rules with regard to war to a farce. Everything was made subordinate to the overmastering dictates of war. Sinking on the high seas without any warning merchant ships, armed or unarmed, in utter disregard of the crews became the order of the day. Retaliatory measures were adopted by the Allies. On November 27, 1939, Great Britain issued a retaliatory order directing the seizure, followed by detention or sale, of goods laden in German ports or of German origin or ownership. At the end of December 1939, the British Admiralty announced that as a measure of protection against indiscriminate mine laying by Germany, a mine-barrage, between 20 and 25 miles wide, would be laid along the entire British east coast, leaving a narrow margin for navigation. After the invasion of Denmark and Norway by Germany, the British Admiralty announced on the 12th April, 1940, that mines had been laid over a large area in the Skagerrak, leaving a channel twenty miles wide open, and the Kattegat, and in the North Sea from a point near the Dutch coast to the Norwegian coast. Lauterpacht observes that these developments tended in the direction of a successful assertion of the right of the belligerent to lay minefields on the high seas irrespective of reprisals but subject to the duty to ensure the relative safety of neutral traffic. On the other hand, the laying of mines by the Allies in some specified areas of Norwegian territorial waters on April 8, 1940, in so far as it could be legally justified, could be explained either on the ground of reprisals or as an act of self-help calculated to put a stop to the abuse of Norwegian territorial waters for the purpose of passage differing from the ordinary commercial routes and intended as a means of

Postal Correspondence.—The Postal Correspondence of the enemy was rendered inviolable by the XI Hague Convention of 1907, although the immunity did not extend to the vessels that carried letters. The correspondence

1. Oppenheim-Lauterpacht : International Law, Vol. 2, Seventh Ed. p. 683

The Hague Conferences .- The First Hague Conference of 1899 attempt ed to prescribe definite rules with regard to aerial warfare. The Hague Regulations respecting the laws and customs of war on land, attached to the Convention of 1907, forbade the discharge of projectiles and explosives from balloons, or by other similar new methods for a period of five years The use of projectiles, the only object of which was the diffusion of asphyxiating or deleterious gases as also the use of bullets which expanded or flattened easily in the human body, was also prohibited. Article 25 laid down that the attack or bo nbardment, by whatever means, of towns, villages, dwellings. or buildings, which were undefended, was prohibited. Article 26 of the Regulations provided that the officer in command of an attacking force must, before compelling a bombardment, except in cases of assault, do all in Article 27 further laid down that in his power to warn the authorities. sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It was the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand. The Convention also laid down that a neutral power was bound to see that no fight on the air took place between the belligerents over the neutral territory.

Defects in Conventions.—There were, however, many loopholes of evasion in the Conventions. In the first place, there was no definition of a "defended" place. The term was very vague and afforded great opportunity for its breach. Munitions factories, military stores or other military or naval stablishments could only be located in a part of the town and the question retained whether the whole town could or could not be hombarded. In the second place, the attempts made by the various conferences to mitigate the destruction on a vast scale by preventing the use of new invention into warfare were bound to result in failure as they could not anticipate the great strides which the aerial warfare was likely to attain by great scientific discoveries. In the third place, the present day conception of war is "total war", which means that everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances and treaties all alike are of no importance. The moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity.

The Institute of International Law at Madrid in 1911 adopted the principle that "aerial war is allowed provided that it does not present for the person or property of the peaceable population greater dangers than land or sea warfare."

First World War.—During the first world war it was claimed by each of the belligerents that they had instructed their aviators to confine their attacks to military objectives only, but it was not possible for the aviators to obey the instructions implicitly on account of the difficulty of accurate aim from great heights and high speeds. The result was that the distinction between combatants and non-combatants almost disappeared and by the end of the war bombardment of open towns outside the region of military objectives had almost become a common feature.

Washington Conference.—As a result of the first world war it was found that the regulations for the use of aircraft in war were utterly inadequate to meet the exigencies of the situation. Accordingly in 1922 at the Washington

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Conference on the Limitation of Armaments attended by England, U.S.A., France, Italy, Japan and Holland, a resolution for the appointment of a commission of jurists to consider the problem of aerial warfare was passed; and the Committee on Aircraft to the Washington Conference enunciated in 1923 various provisions of the proposed Code of Air Warfare Rules. The Code was, however, not ratified, but still the various provisions serve as a guide for the use of aircraft in land and naval warfare.

The important clauses embodied in the Air Warfare Rules, 1923, may be summarised as under:

- 1. Arming of private aircraft even in self-defence is absolutely forbidden.
- 2. Aerial bombardment for the purpose of terrorising the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited.
- 3. Aerial bombardment for the purpose of enforcing compliance with requisitions in kind or payment of contributions in money is prohibited.
- 4. Acrial bombardment is legitimate only when directed at a military objective, the destruction of which would constitute a distinct military advantage to the belligerent, e. g., military establishments, munition factories, lines of communication used for military purposes.
- 5. Aerial bombardment is not legitimate even when directed at a military objective if it cannot be bombarded without the indiscriminate bombardment of the civilian population.
- 6. Bombardment of cities, towns or buildings not in the immediate vicinity of the operations of land forces is prohibited.
- 7. Bombardment in the immediate neighbourhood of the operations of land forces is permitted only when there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment.
- 8. Buildings devoted to public worship, art, religion, science, charity, listorical monuments and hospitals for efugees are to be spared.
- 9. The laws of war and neutrality applicable to land troops are applicable to aerial warfare also.
  - 10. A belligerent State is liable to pay compensation for injuries to persons or to property caused by the violation by any of its officers or forces of the provisions of the above rules.

The Geneva Protocol of 1925 prohibited the use of gas and bacteria in warfare.

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The General Commission of the Disarmament Conference adopted a resolution in July 1932 which provided that air attack against the civilian population shall be absolutely prohibited.

Position of non-combatants.—The General Commission of the Disarmament Conference adopted a resolution in July 1932 to the effect that air attack against the civilian population shall be absolutely prohibited. Before the second world war the immunity of non-combatants from direct attack was always deemed to be an established rule of warfare. Oppenheim attributes three factors which seriously threaten the application of this fundamental

principle of the law of war to air warfare, viz., (a) the enlargement of the scope of and the changes in the character of modern war, with its tendency to obliterate in many respects the distinction between combatants and non-combatants; (b) the resulting difficulty of determining what constitutes a military objective against which direct action is admissible, and (c) the technical difficulty, in regard aerial bombardment, of confining the effects of hostile action to the intended or professed object of attack.

The Nineteenth Assembly of the League adopted in September 1938 a resolution reiterating that the bombing of civilian population was prohibited under the general principles of International Law and urged upon the desirability of making regulations specially adapted to air warfare after taking into account the lessons of experience. The Assembly adopted the following principles as a basis for framing regulations: The intentional bombing of civilian populations was illegal. Objectives aimed at from the air must be legitimate military objectives and must be identifiable. Further, any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood were not bombed through negligence.

Second World War .- In response to an approach by the President of the United States, the Governments of the United Kingdom and France made joint declaration on September 2, 1939, affirming their intention to conduct hotilities with a firm desire to spare the civilian population by confining aerial bombardment to strictly military objectives in the narrowest sense of the word.) On this declaration being made, Germany reciprocated by declaring her intention to follow the same policy. However soon these solemn declarations were given a go-bye, and the second world war witnessed an utter disregard of the rules of aerial warfare. There was a complete violation of rules by indiscriminate bombing of Warsaw and other Polish cities in 1939, followed by the devastating bombardment of the neutral city of Rotterdam on May 14, 1940. The terrible bombardment of London and other British cities by German aircraft in 1944-45 by the use of V-1 rocket bombs fired from bases on the coast of Holland, which brought about untold misery and havor, only showed the depth to which a belligerent could fall in order to win the war. There were loud protests concerning the illegality of the weapon ider Art. 25 of the Regulations as the same could neither aim at a specific arget nor provide adequate warning. Its successor, the V-2, which travelled at supersonic speed, could also not give any warning of its approach. The forewarning of bombardment envisaged in [Art. 26 of the Hague Regulations as also not found to be possible as that would have completely vitiated the nack and also resulted in heavy losses to the attacking force. The British nd American airfleets, however, also in their turn carried on an equally discriminate and ruthless bombing of German cities. The whole war was fought without any regard of the rules of warfare and non-combatants were mercilessly killed and buildings devoted to public worship, art, religion and historical monuments were bombarded. At the climax of it all came the use of the atomic bomb by America against. Hiroshima and Nagasaki on August 6 and 9, 1945, without giving due warning of the danger to non-combatants and in defiance of the protests of many of the scientists who had worked on the As a direct result of the dropping of an atomic bomb on Hiroshima by the simately 60,000 Japanese men, women and children were killed

5. Immovable, was destroyed by blast or by fire. A few days later original owner if the title second world war came to an end.

517

Ethics of Atom Bomb.—Argument 'vaxed furious as to the ethics of atom bonds. It was a most atrocious act and, at any rate, the Japanese should have received advance warning of America's intention to use it and the horrors concomitant with its use.

The use of atom bomb in the war was a violation of the rules of International Law governing civilized warfare from times immemorial. Its use is a crime against International Law and humanity. Sri Jawaharlal Nehru observed that the atom bomb, apart from the inherent horror that went with it and the destruction it might cause, had become a symbol too, a symbol of incarnate evil and if force of circumstances compelled the world to use it, it meant that the world had surrendered to evil completely.

A nation's right to use its own weapons in war is subject to its liability to observe the rules of war incorporated in International Law. It has to be remembered that the Germans were accused of violating International Law when they used submarines in the First World war, as the use of those newly invented vessels was inconsistent with the laws of war. The Germans argued that the invention of new weapons demanded the revision of old laws of war. That argument was regarded as invalid both by politicians and jurists alike. The Americans could not by any stretch of reasoning claim the privilege now which was rightly denied to the Germans. Atomic bomb, hydrogen or the V-bombs cannot be used in war without causing wanton destruction and indiscriminate assassination which are opposed to all sucons of warfare. Hiroshima and Nagasaki, therefore, cannot be cited as precedents and they cannot legalise a thoroughly illegal weapon. International Law cannot be revised without the sanction of the family of nations.

The use of atom or N-bomb is contrary to the spirit of the Charter of the United Nations. It is also in conflict with the Air Warfare Rules, 1923, which clearly provide that aerial bombardment is legitimate only when directed at a military objective, the destruction of which would constitute a distinct military advantage to the belligerent, e.g., military establishments, munition factories, lines of communication used for military purposes. The General Commission of the Disarmament Conference also adopted a resolution in July 1932 prohibiting air attack against civilian population. The atom bomb cannot be disciplined and controlled so as to be directed against military objectives only.

By a resolution passed in November 1961 the General Assembly solemnly resolved that nuclear weapons are an inadmissible means for the conduct of war.

The use of these death-dealing devices, besides being a betrayal of th U. N. Charter, is a betrayal of ourselves by maintaining a balance of terror i the minds of nations and by wasting the nation's wealth on death-dealing devices, when children die for want of nourishment and people suffer for lack of housing, health and work.

Anti-Atomic Measures.—The Nuclear Test Ban Treaty, 1963, banned nuclear tests in the atmosphere, in outer space and under water. This agreement greatly reduced the dangers of radioactive fallout by restricting nucleasts to underground.

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The Outer Space Treaty of 1967 prohibited the static and Before arms in space.

On June 12, 1968, the United Nations Generation of this fundamental Nuclear Non-Proliferation Treaty, and it

immovable property reverts to the legitimate Government after the withdrawal of the enemy. Immovable property belonging to private persons is incapable of being appropriated by the belligerent occupant; it can only be used by him. The private owner is entitled to claim it back on the withdrawal of the enemy.

Payment of Debt.—As regards payment of debt it is regarded as satisfied and extinct if it was paid to the conqueror who had established his government

after the conquest.

Its Influence.—The doctrine of postliminium has lost much of its importance at the present time because treaties of peace, which are very skilfully drawn up, usually provide every minute detail of the relations between the former enemies. Where, however, the treaty of peace is silent and contains no express or implied provision with regard to rights or property which underwent a de facto change during the vicissitudes of war, the doctrine plays an important role in the settlement of rights to property and obligations as also to personal status. And, as Phillimore observes, these rights to property being de facto freed from the pressure of the enemy's force return to the channels in which they flowed before they were by the pressure of that force diverted from them. The principle upon which the doctrine rests, proceeds Phillimore, is that rights duly acquired cannot be permanently taken away, either by the act of an individual or by the act of an enemy State, without the consent of the State, to which the original owner belongs. It has therefore, been the established rule that, in the case of immovable property, even actual possession by the conqueror does not confer a right of alienation which, after the conqueror has departed, will enure to oust the original owner, unless such a result has formed part of the stipulations of a treaty or been ratified by some public act of the

Limitations of the Doctrine. - The limitations of the doctrine of

postlimimum may now be noted :

- 1. The doctrine has no application when a territory is appropriated by the conqueror by possession and establishment of administration or when a territory is ceded to the enemy by a treaty. In case of conquest, viz., possession and administration, the sovereign rights of the conquered State cease. Accordingly, in the Hesse-Cassel case, as discussed below, the doctrine was not applied on the ground that the conqueror had obtained a complete title by virtue of the treaties and the Elector could not assert his title to the property. The doctrine has its application only in case of temporary occupation or subjugation when the conquest has not been consolidated.
  - 2. The doctrine is incapable of being enforced in neutral States.
- 3. The legitimate acts done by the occupant cannot form the subject of the doctrine. Oppenheim mentions that postliminium has no effect upon such acts of a former military occupant, connected with the occupied territory and with the individuals and property thereon, as he was, according to International Law, competent to perform, e.g., punishment of criminals, sale of movable property which the occupant was competent to appropriate, sale of the ordinary fruits of immovable property. Indeed, the State into whose possession such territory has reverted must recognize these legitimate acts.
- 4. Impositions of contributions and requisitions and collection of taxes by the occupant are immune from the application of the doctrine of postliminium.
- 5. Immovable property belonging to the State or private persons got hold of by the enemy in occupation of the territory does not revert to the original owner if the title of the enemy has been perfected by conquest or by treaty.

6. The Naval Prize Act of 1864 provides restitution of a ship or cargo if the recapture is effected at any time during the war that witnessed the capture on payment of certain proportion of the value of the recaptured property. This payment is technically called salvage and is given as a sort of compensation to salvors by whose assistance a ship or cargo is saved from danger or loss at sea. The payment of salvage differs in different countries and there is no uniformity in the matter.

Hesse Cassel Case.—The leading case on the doctrine of postliminium is that of the Elector of Hesse-Cassel. The facts of the case are, no doubt, a bit complicated, but, briefly stated, these are as under:

The consequences of the war between France and Prussia in 1806 extended to the Elector of Hesse-Cassel, a neutral territory, and the French troops occupied the territory and drove out the Elector upon the plea that his armed neutrality endangered the security of the French army.

Hesse-Cassel remained under the military government of France until the end of the year 1807 when the great portion of it was incorporated by Napoleon into the newly-formed Kingdom of Westphalia as a consequence of the Peace of Tilsit, by which Russia and Prussia recognised Jerome Bonaparte as King of Westphalia. Napoleon retained for his own purposes the half of the allodial domains of the Elector, and a compact was entered into at Berlin, on the 22nd April, 1808, between Napoleon and Jerome, for the adjustment of the spoils of Hesse-Cassel.

The King of Westphalia, Jerome Bonaparte, renounced all claim to the debts which were due from persons who were not the subjects of his kingdom, provided that these debts were paid to Napoleon, the Emperor of France, to whom these provinces belonged by right of conquest. Napoleon, on the other hand, declared that he yielded up all the debts of those debtors, whether of princes or noblemen, who were subjects of the King of Westphalia, or of private persons domiciled in his dominions, to the King of Westphalia, for his full and absolute possession and enjoyment.

Towards the close of the year 1813, after Napoleon had lost power in consequence of the battle of Peipsic, the son of the Elector of Hesse returned to his paternal dominions, and his father was confirmed in the possession of them by a treaty with the Allied Power of the 2nd December, 1813, which contained a formal guarantee of his sovereignty; and this was further confirmed by the Peace of Paris, 1814.

A certain Count von Hahn, the possessor of a large landed estate, had borrowed money from the Prince of Hesse-Cassel. He paid to Napoleon only a part of the amount due to the Elector and got a complete discharge from liability. This was in pursuance of a rescript, dated the 15th June, 1810, issued by the Duke of Mecklenburg at the instance of Napoleon. The Court of Registration recorded extinguishment of the mortgages in favour of Hesse-Cassel.

The affairs of the Count became embarrassed and after his death the restored Prince of Hesse-Cassel and other creditors claimed his property.

The restored Prince of Hesse-Cassel denied both the validity of the discharge and the legality of the Macklenburg order of 1810, and asserted that Napoleon possessed himself of the money in the character of a robber and not of a conqueror. It had happened that in many cases Napoleon had remitted—no doubt in order to induce payment—a considerable portion of the original debt, giving, however, a discharge for the whole.

The final Court of Appeal held that it was impossible to consider the re-

turn of the Prince as a continuation of his former government and as such it came to the conclusion that all the debts, whether the whole sum had been paid or not, for which discharges in full had been given by Napoleon, were validly and effectually paid.

The result was that the doctrine of postliminium was not applied to the claim of the Elector on the ground that the conqueror had obtained a complete

title.

#### CHAPTER L

### THE TERMINATION OF WAR

Modes of Termination of War.—Heffter remarks that there are three ways by which war may be concluded and peace restored, viz.

1. By a de facto cessation of hostilities on the part of both belligerents

and a renewal de facto of the relations of peace.

- 2. By the unconditional submission of one belligerent to another; or, as Pitt Cobbett says, by conquest and complete absorption of one belligerent State by the other. The Upper Burma was annexed by the Government of India in the third Burmese War by this method.
- 3. By the conclusion of a formal treaty of peace between the belligerents.

Adverting to the first mode of terminating war, it is not necessary that a formal declaration of the conclusion of war be made in order to restore peace. The usual practice followed by States, however, is that a declaration is made, but there are examples where the war operations ceased silently and de facto peace was obtained. The war between Sweden and Poland ended in the year 1716 by mutual stoppage of hostilities and peace was formally proclaimed de jure after a lapse of ten years. The termination of war between France and Spain (1720) and Russia and Prussia (1801) are further examples. The method, however, is unsatisfactory as it leads to uncertainty and indefiniteness in the relations of the erstwhile belligerents as also neutrals.

The third mode, viz., the conclusion of peace treaties to terminate war, is the most common feature. The Treaties of Versailles furnish examples of this method of termination of war. This is the most satisfactory method as it settles all future controversy by making provisions for territorial adjustments and war indemnity.

War, in the practical and realistic sense in which it is commonly used, refers to the period of hostilities and not to a technical state of war which may exist after the fighting has ended. (New York Life Ins. Co. v. Durham, 10 Cir., 166 F. 2d 874, 876)... The plain, ordinary and generally accepted meaning of the word 'war' is war in fact. (Wilkinson v. Equitable Life Assur. Soc., 2 Misc. 2d 249, 252, 151 N. Y. S. 2d 1018, 1022). In the mind of the ordinary or average man, a war is considered at an end on the final cessation of hostilities following an armistice or cease fire looking toward complete peace. For example, a common expression when the fighting stops, heard in the street or seen in the headlines, is the "War is over". (Shneiderman v. Metropolitan Casualty Company of New York, Supreme Court, Appellate Division, New York, 1901, 220 N. Y. S. 2d 947).

<sup>1.</sup> As quoted by Phillimore in his International Law, V ol. III, p. 770.

Effect of Treaty of Peace.—The immediate effect of a treaty is the cessation of hostilities and restoration of the status quo ante. Normal business relations start. War prisoners are released. Article 118 of the Geneva Convention relative to the Treatment of Prisoners of War of 1949 specifically provides that the prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. The literal enforcement of this article had been the main obstacle to an armistic in the Korean War. The United Nations negotiators objected to any forced repatriation of unwilling prisoners to the Communists on the ground that it would defeat the purpose of the Convention if the prisoners were coerced after their release, while the Communists demanded wholesale repatriation of North Korean and Chinese prisoners of war to Communist territory in terms of the article which is categorical. Article 119 lays down the details of procedure for effecting repatriation. Articles of value impounded from prisoners of war are to be restored to them. They are allowed to take with them their personal effects.

As a result of cessation of hostilities diplomatic intercourse is resumed. The treaties, as stated above, make express stipulations with regard to the annexation of territories; but in the absence of any provision private properties are restored. No fresh capture of ships and occupation of territory are lawful. Requisitions and contributions can no longer be levied after the signing of the treaty of peace and the arrears remaining unpaid cannot be demanded.

The treaty of peace revives claims founded upon debts contracted or injuries inflicted previously to the war, unless there be any specific provision in the treaty to the contrary.

Uti Possidetis.—Lawrence points out that "as between the belligerent powers themselves, it is held that the conclusion of peace legalizes the state of possession existing at the moment, unless special stipulations to the contrary are contained in the treaty. This is called the principle of uti possidetis............ Cities, districts, and provinces held in belligerent occupation by an enemy, fall to him by the title of conquest, when it is not expressly stated that they are to be evacuated. Captures from an enemy made at sea but not yet condemned by a Prize Court become the lawful possessions of the captor, and seizures on land of such things as a belligerent is allowed by the laws of war to appropriate are his by good title." Unless there is a provision to the contrary in the treaty the conquered territory remains in the hands of the possessor entitling him to annex the same. All movable State property as also the fruits of immovable property seized by a belligerent remains his property.

Armistice and Truce.—Treaties of peace as a rule are preceded by armistices, which are agreements among the belligerents for the temporary suspension of hostilities. According to Lawrence an agreement to cease from active operations within a limited area, for a short time and with the object of carrying out a definite purpose such as the burial of the dead is generally called a Suspension of Arms, but it is also, and with equal propriety, termed an Armistice, the latter being the English usage. A similar agreement, extending over a very long period and applying to the whole field of warfare, goes frequently by the name of a Truce.

General and Local Armistices.—Article 37 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907 distinguishes between General and Local Armistices. General armistices suspend the entire military operations of the belligerent States everywhere, while the local armistices suspend military operations of the

<sup>1.</sup> Lawrence: The Principles of International Law, 7th Ed, p. 562.

belligerent States only between certain fractions of the belligerent armies and within a fixed radius.

Effect of Armistice.—"A general armistice", observes Sir Hersch Lauterpacht, "is a cessation of hostilities which, in contradistinction to suspension of arms with their momentary and local military purposes, is agreed upon between belligerents for the whole of their forces, and the whole region of war....."

The legal state of war continues unaffected by the armistice. The Hague Regulations provide that any serious violation of the armistice by one of the parties gives the aggrieved party the right of denouncing it, and, even in cases of urgency, of recommencing hostilities immediately. If the duration of the armistice has not been agreed upon, either belligerent may resume operations at any moment, provided that he gives clear and sufficient notice to his foe.

According to Sir Hersch Lauterpacht, "armistices or truces, in the wider sense of the term, are all agreements between belligerent forces for a temporary cessation of hostilities. They are in no wise to be compared to peace .......because the condition of war remains between the belligerents themselves, and between belligerents and neutrals on all points beyond the mere cessation of hostilities.....the right of visit and search over neutral merchantmen therefore remains intact as does likewise the right to capture neutral vessels attempting to break a blockade and the right to seize contraband of war....."

A general armistice is concluded by commanders-in-chief or diplomatic representatives and requires ratification by the supreme power of the State. A partial or local armistice can be concluded by a commander as it involves only forces and places under his immediate command. Ratification is not necessary.

First World War.—The first world war ended on November 11, 1918, by the conclusion of an agreement between the Allied Powers and Germany. This agreement was termed an "armistice." It was a misnomer to call this an armistice for it was in the nature of a capitulation and fell under the heading termination of war."

Second World War.—The second world war ended by the unconditional surrender of the defeated armies. The treaties which subsequently brought about the end of the war were negotiated with the defeated powers, but were forced upon them. The treaties with the satellite States of Germany were signed in Paris on February 10, 1947. The treaties with Germany and Austria had been the most potential cause of differences between America and England, on the one side, and Russia, on the other. The Japanese peace treaty, sponsored by America in collaboration with Britain, was signed by 48 nations and Japan at the peace conference in San Francisco on September 8, 1951. Russia vehemently criticised the Japanese peace treaty as manifesting a policy of all-out encouragement of Japanese militarism and called it as a draft for a new war. India signed a separate peace treaty with Japan on June 9, 1952, which was ratified on August 27, 1952.

# PART IV The Law of Neutrality

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The case of the General Armstrong<sup>1</sup> lays down the principle that if a belligerent on being attacked elects to defend himself without seeking neutral protection, he frees the neutral State from any further responsibility.

In the Ryeshtelni<sup>2</sup> it was laid down, in the words of Pitt Cobbett, that where a neutral power has by its persistent infractions of neutrality shown itself unable or unwilling to discharge its neutral functions and where the injury threatened by some immediate breach is grave and not otherwise remediable, an act of self-redress on the part of the belligerent whose interests are impugned would be legally admissible as an alternative to war.

In the case of the Appam, a German cruiser had captured the Appam, which was a British merchant vessel, 1600 miles from Emden and brought her, on February 1, 1916, to the port of Norfolk (U. S. A.) although U. S. A. was neutral. Libel proceedings were started against the vessel on the ground that her presence in the port was in violation of the neutrality of the United States. The Supreme Court held that the effort to make of an American port a depository of captured vessels with a view to keeping them there indefinitely was a breach of neutrality within the traditional policy of the United States and the provisions of the Hague Convention concerning the rights and duties of neutral powers in naval war.

In the case of the Zamora, while discussing the right of the neutrals with regard to their ships and goods in the custody of the Prize Court for adjudication, Lord Parker observed that a belligerent power has by International Law the right to requisition their vessels or goods in the custody of its Prize Courts pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.

### RIGHT OF ANGARY

Its Meaning.—The right of angary denotes the right of a belligerent State in times of war or other public danger to use or even, when necessary, to destroy such neutral property as happens to be within its territorial jurisdiction at a particular time. It affords a belligerent State to requisition or appropriate, in times of public urgency, vessels, rolling stock, aircraft and other means of transport belonging to the nationals of neutral powers, but lying at the time within its own territorial jurisdiction. This is founded on the principle that the supreme interest of the State overrides law. It is as well based on the general principle that neutral property in belligerent territory is exposed to like risks as the property of belligerent nationals and is subject to similar liability to requisitions and contributions in time of war and other national emergency. This right is also called droit d'angarie or jus angariae and has been anglicized into angary.

2. Ibid., p. 354 3. (1916) 2 A. C. 77.

<sup>1.</sup> Pitt Cobbett's Leading Cases, Vol II, Ed. V. p. 351.

Its Genesis.—The word "angary" is iderived from Persian denoting a "messenger" of the Royal Courier Service. The word subsequently found place in Greece and Rome. Oppenheim observes that the term angaria, which in mediaeval Latin means post-station, is a derivation from the Greek term implying messenger. Jus angariae would, therefore, literally mean a right of transform. In Roman Law it signified the requisition of wagons, horses, etc., and was confined to land transport only. In the Middle Ages the right of angary signified that neutral vessels in the port of a belligerent might be seized and made to transport troops and supplies to certain places on payment of freight charges in advance. This right in modern times, as we have seen above, vests a belligerent in times of war or other public danger, for the purpose of offence or defence, with authority to requisition, upon payment of compensation, foreign ships, aircraft and other means of transport which are within the territorial jurisdiction of the State requisitioning them.

Oppenheim observes that, in contradistinction to the original right of angary, the modern right of angary is a right of belligerents to destroy, or use, in case of necessity, for the purpose of offence and defence, neutral property on their territory, or on enemy territory or on the open sea. According to him, this right is a right deriving from the law of war, and must not be confused with the right, which every State undoubtedly possesses, of seizing in case of emergency, and subject to compensation, any foreign property on its territory. One ought not therefore to speak of a right of angary belonging to neutrals as well as to belligerents, or of a right of angary in peace as well as at war. (International Law, Vol. 2, 7th Ed., pp. 761, 765).

Pitt Cobbett takes slightly a different view. He regards the right of angary as a sovereign right. He says: "The right of a belligerent to detain, use or destroy neutral property within his own unoccupied territory or control, subject to full compensation, must be distinguished from the right of a belligerent to commit similar acts in occupied territory. The right of the latter is derived from the laws and customs of war and can only be exercised by virtue of military necessity, the right of the former from the constitutional principle of the sovereignty of the State. By virtue of this principle embodied in the maxim saius rei publicae est suprema lex, a State, whether belligerent or neutral, either in time of war or peace, may requisition the neutral property found within its protection. This right is recognized in International Law, and to it is properly given the name of jus angariae." (Leading Cases on International Law, Vol. 2, 5th Ed., p. 330).

"There is yet another measure," says R. Phillimore, partaking also of a belligerent character though exercised, strictly speaking, also in time of peace, called the French le droit 'dangarie. It is an act of the State by which foreign as well as private domestic vessels which happen to be within the jurisdiction of the State are seized upon and compelled to transport soldiers, ammunition, or other instruments of war; in other words, to become parties against their will to carrying on direct hostilities against a power with whem they are at peace."

Article 19 of Convention V of the Second Hagu: Conference (1907) specifically recognises the right of angary in allowing a belligerent to utilise in case of absolute necessity, railway material belonging to neutrals, subject to the payment of compensation. Other neutral property is also liable to be used, or even destroyed by a belligerent, if military necessity so ordains. Phillimore is of the view that this right is capable of being exercised only on payment of freight in advance and on the further condition that the owners of the goods

or the vessels are indemnified for all damages caused by the interruption of their lawful gains and from possible destruction of the goods they carry.

Franco-German War of 1870.—During the Franco-German War of 1870, the German general in command seized six British vessels in the river Seine near the town of Duclair and scuttled them in the Seine to block the passage of the river with a view to preventing French gunboats from going up the river and interfering with the German military operations. England was neutral in the war. Prince Bismark admitted their destruction and offered to pay the value according to equitable estimation. He contended that the measure in question, however exceptional in its nature, did not overstep the bounds of international warlike usages. A pressing danger was at hand, and every other means of averting it was wanting; the case was therefore one of necessity, which even in time of peace might render the employment or destruction of foreign property admissible, under reservation of indemnification. The German Chancellor then quoted the passage from Sir R. Phillimore's work already referred to above. Indemnities were later paid to the English shipowners for their loss.

Limitations.—The right of angary is a sovereign right and can be exercised by any sovereign State in case of national emergency, provided the goods and means of transport requisitioned are lying within the territorial jurisdiction of the State requisitioning them. The right is confined to the territorial waters of the requisitioning State and does not extend beyond its territorial limits. The right can as well be exercised by a neutral in grave national emergency. Such requisitions can only be made subject to the payment of full compensation. The right cannot be exercised by a belligerent in occupation of an enemy territory. The right of angary does not extend to the services of the foreign crew of the ships or aircraft. Hall observes that comparatively little objection can be taken to the appropriation of property permanently or for a considerable time within belligerent territory, but it might perhaps be expected, certainly hoped, that the application of this right could not be extended to neutral property only passing within a belligerent State. It might as well be expected that the right would not be used to justify destruction of property as distinguished from appropriation. But, curiously enough, the application of this right has been extended to these lengths.

First World War.—During the First World War a number of cases of the requisition of neutral property arose. In February 1916 Portugal seized 72 German vessels in Portuguese waters. In May 1917 Brazil took over 42 German ships that had found refuge in Brazilian waters. In 1917 the British Government requisitioned a number of Swedish and Dutch vessels lying in British ports. Again, in March 1918, the United States of America, Great Britain, France and Italy requisitioned a number of Dutch vessels in their ports in the alleged exercise of the right of angary. The Dutch Government lodged a strong caveat at the absurd extension of the right of angary, which would allow the seizure en masse of the merchant fleet of a neutral State. At the end of the war the United States paid in full for the use of the Dutch vessels and returned them reconditioned to the owners. The United States also paid for two ships which had been sunk by German submarines.

Admittedly this right allows a State in times of war or public danger to requisition foreign ships, aircraft and other means of transport that are urgently needed for the purposes of transport and which at the time of requisition happen to fall within the territorial jurisdiction of the State requisitioning them. But it would be carrying this right to absurd lengths to allow

belligerents to seize any neutral property within their jurisdiction for the general purpose of conveying the food supplies of the civil population. The whole question of angary, as Holland observes, is bound up with the question of what constitutes military necessity. English Courts appear to hage extended the term "angary" to requisition of any form of neutral property within their jurisdiction.

The Zamora.—In the case of the Zamora<sup>1</sup> timber and copper needed for the successful prosecution of the war were requisitioned. It was observed by Lord Parker that a belligerent has in a proper case the power to requisition ships and goods of neutrals in the custody of the Prize Court for adjudication. The legal property or dominion is, no doubt, still in the neutral. The right of requisition is not an absolute right, but a right exercisable in certain circumstances and for certain purposes only. It was, therefore, held that requisition of a vessel or cargo of copper awaiting the judgment of the Prize Court was allowed provided that (a) the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security; (b) there must be a real question to be tried; and (c) the Prize Court determines judicially whether under the particular circumstances of the case, the right is exercisable.

Right of Angary in relation to Land Warfare.—The right of angary is also applicable to land warfare, and Article 19 of the Fifth Hague Convention of 1907 provides that a belligerent may seize or requisition railroad material regardless of ownership coming into its territory from a neutral state, provided that absolute necessity requires this to be done and that such seized properties be returned to the country of origin as soon as possible on payment of compensation for its use. The article also permits a neutral state to seize and retain to a corresponding extent the rolling stock and motive power of the belligerent who had initially seized its railroad rolling stock. These rules have in practice been extended to cover neutral rolling stock and motive power found by a belligerent in occupied enemy territory.

### CHAPTER LIII

BLOCKADE

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Definition.—"Blockade is the blocking by men-of-war of the approach to the enemy coast, or a part of it, for the purpose of preventing ingress and egress of vessels or aircraft of all nations". According to Hall, blockade, in times of war, consists in the interception by a belligerent of access to a territory or to a place which is in the possession of his enemy. It is an act of war carried out by the warships of a belligerent, the act being directed to prevent access to or departure from a defined port of the enemy's coast.

Characteristics of Blockade.—The above definitions bring out the following characteristics of blockade. In the first place, blockade must be by men-of-war though it may be reinforced by other means. In the second place, only enemy coast or part of it or enemy ports are to be the objects of a blockade. In the third place, blockade may prevent ingress or egress or both. In the fourth place, blockade to be admissible must be impartially applied to vessels or aircraft of all nations. And, lastly, blockade is a warlike operation.

Blockade is not to be confused with siege, which aims at the capture of the besieged place; blockade intercepts all intercourse by sea.

<sup>1. (1916) 2</sup> A. C. 77.

<sup>2.</sup> Oppenheim: International Law, Vol. 11, p. 768

Declaration of Paris (1856).—The fourth article of the Declaration of Paris, 1856, laid down that blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy. This formula reduced into writing a principle of the law of nations, but left open the disputed question as to what was a "sufficient force". Lord Chief Justice Cockburn observed in the case of Geipal v. Smith¹ that "in the eye of the law a blockade is effective if the enemy's ships are in such numbers and positions as to render running the blockade a matter of danger, although some vessels may succeed in getting through." The size of the blockading force and the distance at which it operates from the blockaded coast are not regarded material. The Declaration of Paris only emphasized that there must be real and pressing danger in any attempt to pass through before the blockade could be complete.

In the Crimean War (1854) a single British cruiser was deemed to constitute a blockade of the Russian port of Riga by covering a distance of 120 miles. On the other hand, the blockade of Formosa, notified by France in 1884, was regarded as incomplete when Britain protested that the force at the disposal of the French admiral was insufficient. The blockade was in consequence abandoned till the arrival of the reinforcement.

Wheaton observes that a blockade being thus an infringement of neutral rights, its operation is not to be extended further than the actual circumstances of the case.

Declaration of London (1909) .- The unratified Declaration of London confirmed the rule of the Declaration of Paris (1856) that a blockade to be binding must be effective. It further added that the blockade must declared and notified. The declaration of blockade, according to the Declaration of London, must be made either by a belligerent government or by a commander of a naval force acting on behalf of his State specifying the date when the blockade legins, the geographical limits of the coastline under blockade and the period within which neutral vessels may come out. The rule was based in the interests of neutrals that they must know the exact extent of their liabilities. Article 11 of the Declaration of London provided that a notification of Llockade must Le made by the government of the State which establishes it to neutral powers, by means of a communication addressed to their governments. The Declaration of London further provided that a blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy and that the blockading forces must not bar access to neutral ports or coasts.

Actual knowledge of the blockade renders the vessel liable to capture and condemnation as a matter of course if the blockade is effective and af violation has taken place. According to Article 15 of the Declaration of London knowledge is presumed if the vessel left a neutral port after the notification of the blockade to the territorial power and the lapse of sufficient time for the local authorities to publish it. Article 17 provides that neutral vessels may not be captured for breach of blockade except within the zone of operations of the warships detailed to render the blockade effective. Article 19 lays down that whatever may be the ulterior destination of a vessels, or of her cargo, she may not be captured for breach of blockade, if at the moment she is on her way to a non-blockaded port. Article 21 provides the penalty for breach of blockade. It lays down that a vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned unless it is

<sup>1. (1872)</sup> L. R. 7 Q B. at p. 410.

proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade.

Forms of blockade.—There are various forms of blockade. There is the effective blockade, which is maintained by a force sufficient to render hazardous the ingress to or egress from a port. When the blockade is maintained by effective force, there is a blockade de facto. Blockade by notification takes place when the same has been declared and notified by diplomatic notice that certain ports or coastlines are under blockade. When blockade is simply notified but there is no force behind to maintain it, it is termed paper blockade, which, as Lawrence points out, is no blockade but a lawless attempt to injure neutral trade without right. There is then strategic blockade if it forms part of other military operations directed against the blockaded port. A commercial blockade or pacific blockade is carried on with the object of diminishing the resources of the enemy by cutting off his external commerce. It brings about temporary suspension of the commerce of an offending or recalcitrant State by the closing of access to its coasts or of some particular part of the coasts, but without recourse to other hostile measures. It represents an effective method for the settlement of a dispute by coercive measures short of war, applied by a strong State against a weaker State. A pacific blockade, unlike a hostile blockade, does not create a formal state of war and is applied only to the ships of the blockaded State. A military blockade takes place as incident to some military operation proceeding on land. Lastly, there are simple and public blockades. the case of the former, the captors are bound to prove the existence of a blockade at the time of the capture; while in the case of the latter the claimants are held liable to proof of discontinuance in order to protect themselves from the penalties of alleged violation. In the case of a public blockade, a ship hovering near a blockaded port cannot plead that she was going to the blockading squadron to ask for authority to continue her voyage.

Essentials of a Real and Binding Blockade.—The essentials of a real and binding blockade are as under:

- 1. Proper Establishment: In order that a blockade may be valid it must be established under the authority of a belligerent government, or a naval commander specially authorized to declare a particular blockade.
- 2. Effectiveness: The blockade must be duly effective. It should not be a fictitious or paper blockade, but should be maintained by a force sufficient to prevent access to the coasts of the enemy. This aspect of blockade was emphasized both by the Declaration of Paris (1856) and the Declaration of London (1909). There must be a real and pressing danger to vessels in a y attempt to pass through.

There is no unanimity as to the essential requirements for an effective blockade. It was observed by the Lords of Appeal in The Nancy (1809) that "it was the duty of the blockaders to maintain such a force as would be of itself sufficient to enforce the blockade. This could only be effected by keeping a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the blockaded island."

Rt. Hon. Dr. Lushington observed in the Franciska [(1855) Spinks, 217] in the High Court of Admiralty that the blockaded place must be watched by a force sufficient to render egress or ingress dangerous; or, in other words, save under peculiar circumstances, as fogs, violent winds and some necessary

absences, the force must be sufficient to render the capture of vessels attempting to go in or come out most probable.

Lord Chief Justice Cockburn observed in Geipal v. Smith [(1872) L. R. 7 Q. B. 404] that "in the eye of the law a blockade is effective if the enemy's ships are in such numbers and positions as to render running the blockade a matter of danger, although some vessels may succeed in getting through."

A somewhat stringent view was expressed by the First Armed Neutrality of 1780 by declaring that "a blockade is effective only when the approach to the coast is barred by a chain of men-of-war, anchored on the spot, and so near to one another that the line cannot be passed without obvious danger to the passing vessel." (Cf. Oppenheim's International Law, Vol. II, 7th ed., p. 779). Phillimore takes a similar view when he observes that "a blockade de facto should be effected by stationing a number of ships, and forming as it were an arch of circumvallation round the mouth of the prohibited port, where, if the arch fails in any one part, the blockade itself fails altogether." (iii, S. 293).

The question whether a blockade is effective or not, is a question of fact: See Art. 3, Declaration of London, 1909, and Oriental Navigation Company, (1928) A. J. I. L. 23 (1929) p. 435, at p. 442.

- 3. Continuously Maintained: The blockade must be continuously maintained. When the blockading squadron is driven off by superior force of the enemy, it has been held that the blockade is null and defective from the beginning. The blockade will, however, not be impaired if the blockading squadron is temporarily withdrawn due to bad weather.
- 4. Notification: The Declaration of London laid down that in order to establish a blockade it is essential that it should be notified, The notification must be made either by a belligerent government or by a commander of a naval force acting on behan of his State and must specify the date when the blockade begins, the geographical limits of the coastline under blockade and the period within which neutral vessels may come out. The notice of blockade must correspond to actual facts, otherwise the blockade would become ineffective.
- 5. Impartiality: The blockading force must enforce the blockade impartially against all vessels. Any relaxation of restriction in favour of a belligeent to the exclusion of neutrals renders the blockade inoperative. Blockade is admissible only when there is a universal blockade. In the case of The Franciska the British blockade of Riga during the Crimean War against Russia was declared by the Privy Council to be invalid because relaxations were granted to belligerent merchant vessels to the exclusion of neutrals.
  - 6. The blockading force must not bar access to neutral ports or coasts.
- 7. A blockade cannot extend beyond the area covered by the operation of the forces which maintain it.

Breach of Blockade.—"To constitute a violation of blockade", says Sir William Scott, three things must be proved: 1st. The existence of an actual blockade; 2ndly. The knowledge of the party supposed to have offended; and 3rdly. Some act of violation either by going in or coming out with a cargo laden after the commencement of blockade". Not only must an actual blockade exist, but a knowledge of it must be brought home to the party, in order to show that it has been violated.

<sup>1.</sup> The Betsey, 1 C. Rob. 92.

The practice of States as to what constitutes a breach of blockade has varied. England and America share the view that it is enough to establish presumptively that those in charge of the neutral vessel knew that a blockade had been established. Great Britain has always held the view that notoriety of blockades was equivalent to conveying information of the existence of blockades. According to the French view the neutral vessel is not affected by presumptions as to continuance or cesser of blockade and the commander of the neutral vessel on approaching the blockaded area is entitled to get a warning of the existence of the blockade by the blockading squadron. It is, however, settled that in case of blockade by notification, notice is persumed if the notification has been duly issued and sufficient time has elapsed since then to enable the neutral Governments to receive the same.

Cessation of Blockade.—A blockade ceases to exist on the happening of either of the following contingencies :

- (1) on the termination of the war;
- (2) when the government which instituted the blockade withdraws it;
- (3) when it ceases to be effective;
- (4) when the blockading squadron is defeated and driven off by a hostile force;
  - (5) when it is withdrawn for a chase or an action; and
- (6) when the place or port under blockade is occupied by a victorious belligerrent.

Penalty for Breach of Blockade.—The mere intention to violate a blockade is not a sufficient ground for the condemnation. There must be the intention coupled with some act showing an attempt to enter the port. The general rule is that a ship is condemned for breach of blockade and along with it the cargo shares the same fate. The owners of the cargo are deemed to have known of the existence of the blockade when the shipment was made and they are regarded as privy to violating the blockade.

Article 21 of the Declaration of London clarified the rule by stating that a vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned, unless it is proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade.

After the capture the blockade-runner is sent to a port for determination by a prize court. It is not necessary to imprison the crew who, in any case, must be released after the prize court's decision. There is confiscation of both vessel and cargo if the owners of the vessel and cargo are the same. When they are different, cargo is confiscated only in case of contraband of war or if the owners knew of the blockade at the time of the shipment.

Case Law.—A few leading cases on the subject may now be noticed. In the case of the Franciska, already referred to, the Franciska was a Danish vessel, which was captured by a British cruiesr when on her way to Riga, a port blockaded by Britain during the Crimean War against Russia. It was argued on behalf of the owners of the ship that there was no intention to break the blockade and she was ordered to proceed to Riga only if there was no blockade. It was held that the blockaded place must be watched by a force sufficient to render egress or ingress dangerous and that the plea of ignorance of the

existence of the blockade in the particular case was invalid because the captain of the ship was aware of the blockade when the ship sailed from the last port. Their Lordships of the Privy Council, however, came to the conclusion that the blokede even though otherwise legal had been rendered invalid by certain relaxations granted to belligerent merchant vessels to the exclusion of neutrals.

In the case of the Frederic Molke1 a Danish vessel was captured by a British vessel, while she was coming out of the port of Havre, a port blockaded by Britain during the war with France. The Danish ship was a neutral ship and its real destination was the port of Havre, though ostensibly she was booked for Copenhagen. Lord Stowell condemned the ship and the cargo, as the ship had been informed of the existence of the blockade. It was held that a vessel coming out of a blockaded port with a cargo was prima facia liable to seizure.

Proof Required .- In the Betsey, 2 alredy referred to, Sir William Scott observed that on the question of blockade three things must be proved; first, the existence of an actual blockade; secondly, the knowledge of the party; and thirdly, some act of violation, either by going in, or by coming out, with a cargo laden after the commencement of blockade.

In the case of the Prize Cases in re Hiwatha3 it was observed by the United States Supreme Court that the vessel being in a blockaded port is presumed to have notice of the blockade as soon as it commences. This is settled rule in the law of nations. The cargo must share the fate of the vessel.

In the case of the Zamora Lord Parker observed that an Order declaring a blockade will prima facie justify the capture and condemnation of vessels attempting to enter the blockaded ports, ports, but will not preclude evidence to show that the blockade is ineffective and therefore unlawful.

In the case of the Leonora<sup>5</sup> it was a Dutch vessel chartered by a Swedish company. She was captured by a British cruiser. It was held that the Order in Council which authorized the ship to be captured did not amount to the declaration of blockade to neutral ports and that it did not ban carriage of the goods completely by the neutrals, who could carry goods with impunity by calling at the appointed port or ports.

### Long Distance Blockade

First World War .- During the First World War (1:14-18) the British Navy confronted by mines and submarines enforced a long distance blockade of Germany through ships covering a distance of more than one thousand miles from German ports. The civilian population suffered severely and Germany denouced the blockade as unlawful. The long distance blockade enforced by England was in the nature of a reprisal for the German decision to attack British and All;ed merchantmen in the waters surrounding the British Isles without any regard for the protection of the passengers or crew. In the case of the Stigstads it was held by Lord Sumner that a belligerent has a right to resort to retaliatory measures against the breaches of International Law on the part of another belligerent and that an absolute right in neutral trade to

<sup>1. (1798)</sup> I C. Rob. 85.

<sup>2. (1793)</sup> C. Rob, Admiralty Reports, vol 1, p. 93.

<sup>3. (1862) 2</sup> Black, 635. 4. (1916 2 A. C. 77. 5. (1919) A. C. 974.

<sup>6. (1919)</sup> A. C. 279.

proceed without interference or restriction did not exist in view of the application of the rules of contraband traffic, unneutral service and blockade.

Second World War.—In the Second World War (1939-45) the long distance blockade was again resorted to by Britain and France on the plea of total economic warfare, but this was not very effective on account of open front on the east. Germany also commenced minelaying and submarine warfarc. Great Britain as a measure of reprisal issued on November 27, 1939, an Order in Council which authorised seizure of goods laden in German ports or of German origin or ownership. The Order in Council of July 31, 1940, directed that goods might become liable to seizure in the absence of a navicert (certificate given by a diplomatic representative in a neutral country testifying that the cargo on board a neutral vessel was not liable to seizure) to cover them and provided that there was a presumption that unnavicerted goods had an enemy destination. The system of Navicerts, Mailcerts, etc., simplified the blockade and had the effect of virtually controlling neutral trade through certificates and passes issued by a diplomatic or consular representative in a neutral country. These measures could not strictly be brought within the requirements of the generally accepted rules of blockade, but they were necessitaed owing to the changed conditions of naval war.) Lauterpacht is of the uicw that "these measures could not be squared with the technical requirement of the law of blockade as generally accepted. But it is equally clear that in so far as modern warfare has assumed a predominantly economic character, some of the rules of the accepted law of blockade have become inapplicable in the changed conditions of naval war and of communications, and that unless altered by agreement they are likely to be honoured more in the breach than in the observance." He regards these measures repeated in successive the form of reprisals and aiming at the economic isolation of the opposing belligerent as a development of the latent principle of the law of blockade, namely, that the belligerent who possesses the effective command of the sea is entitled to deprive his opponent of the use thereof for the purpose either of navigation by his own vessels or of conveying on neutral vessels such goods as are destined to or originate from him.

It will appear from the above that the old system under which the blockading naval forces remained constantly close to or just outside a blockaded port proves no longer feasible in the modern conditions, especially due to the extended range of shore batteries and torpedo-boats and the action of submarines and i incs, which necessitates the blockading forces to remain out of sight of the blockaded coasts. The blockading naval squadron is also exposed to serious attacks by enemy action from the air. In the circumstances, as observed by Higgins and Colombos, the institution of an actual blockade by a 'cordon' of stationary ships is impracticable. A blockade restricted to vessels sailing directly to enemy coasts and ports could now be effective only as against insular powers, such as Great Britain and Japan. 1

The establishment of 'close' blockades having become impossible, the legality of long range blockades cannot, therefore, be challe nged if the right of a belligerent to cut off the sea-borne commerce of his enemy is recognised.

It may, therefore, be admitted, to quote Higgins and Colombos again, that "blockades conducted in strict a coordance with the old rules are of little strategic value and that, in the circumstances of modern naval warfare, long range blockades are valid provided that they effectively prevent the ingress to,

<sup>1.</sup> Higgins and Colmbos: The International Law of the Sea, 2nd Ed., p. 559.

or egress of all vessels and goods from, the blockaded area by sea, and provided also that they are properly announced and maintained."1

Quarantine of Cuba .- In the crisis emanating from Cuban armament build-up in 1962 as a result of suplies of Soviet military equipment accompanied by large number of technicians, the United States of America, after considering the situation, closed its ports to all ships carrying arms to Cuba and ships sailing between a Communist-bloc port and Cuba, and also proall vessels registered in the United States from engaging in any manner in the Cuban trade. The United States aerial reconnaissance had also brought to light the installation of medium-range ballistic missiles and the construction of sites for intermediate range missiles in Cuba. This led the United States to institute a quarantine or blockade of Cuba. The quarantine was a step midway between pacific blockade and hostile blockade, inasmuch as although a state of war did not exist in this case, it was applied against vessels of a third state. The basis of this step taken by the United States was the provision for regional collective action as envisaged in the Rio Treaty of 1947. The United States did not invoke the docrine of self-defence within the meaning of Art. 51 of the Charter and based its action in conformity with regional defence arrangements under Art. 52 (1). This action was, however, in violation of Art. 53 (a) of the Charter which does not permit enforcement action under regional arrangements without the authorization of the Security Council. But from practical point of view there was no option with the United States Government, for resort to the method contemplated in the provisions of the Charter would have meant paralysation of any swift action, which was necessitated in the circu astances of the case. Further, the aerial reconnaissance of Cuba prior to the discovery of missiles and sites there, repeated, on a much larger scale, the same activity which had led to the U-2 crisis of 1960 between the Soviet Union and the United States. The national airspace of an independent State was violated by American airmen who undertook both high-level and low-level flights accompanied by photography of Cuba's territory. The United States, however, justified the overflights of Cuba on the ground that the security of the United States was at stake.

In the light of the provisions of Art. 42 of the Charter, unilateral institution of a pacific blockade is not legal. It is legal only when it is adopted by the United Nations as a collective enforcement action. The provisions of Art. 2, paras. 3 and 4 as also the methods for pacific settlement of disputes listed in Art. 33 of the Charter do not contemplate the institution of a pacific blockade as a method of resolution of disputes.

The French-British attack on Egypt in 1956 based on their fancied right of unilateral action within the meaning of Art. 2, para. 4 of the Charter was condemned both by the Secretary-General of the United Nations and writers of International Law, although both the British and French Governments justified the use of military force by unilateral action as legitimate by the exercise of vetoes cast by them in the Security Council.

Higgins and Colombos: The International Law of the Sca, 2nd Ed., p. 560.

## CHAPTER LIV CONTRABAND



Definition .- In modern International Law "contraband of war is the designation of such goods as are forbidden by either belligerent to be carried to the enemy on the ground that they enable him to carry on the war with greater vigour." According to :Kelsen "contraband of war are goods the transport of which to the enemy is forbidden by either belligerent in conformity with general International Law." Contraband of war denotes such articles as are considered objectionable to be carried by a neutral to a belligerent because they are calculated to be of direct service in carrying on war or otherwise assist one of the belligerents in the conduct of war.

Jackson observes that contraband is property which has a hostile destina-

tion and is of a character capable of assisting the enemy in war.

The object of contraband, like that of blockade, is to cripple the enemy's commerce. But in contraband it is the cargo which is the main object of capture, while in blockade it is the ship.

Its basis.-The basis of the law of contraband, according to Pitt Cobbett, is the right of a belligerent to condemn neutral property which is destined for the military use of his enemy.

Division of Commodities.—Grotius divided commodities into three classes: (1) things useful for war only, e.g., arms, projectiles, powder, etc.. (2) things useless for warlike purposes, e. g., fashion and fancy goods, clocks and watches, soap, etc., and (3) things useful in war and peace indifferently, i. e., money, provisions, ships, naval stores, etc. According to him, the first was liable to capture while on their way to an enemy destination; the second was always immune from capture and the third depended upon circumstances in cach case.

Vattel makes somewhat of a similar distinction, but he includes timber and naval stores among those articles which are useful for the purposes of war and as such prohibits neutrals from carrying them to the enemy.

There is a divergence of opinion as to what articles are to be termed as contraband. The British view favoured a long list of contraband goods and divided articles into absolute contraband and conditional, occasional or relative contraband. Absolute contraband included articles such as arms, machinery for manufacturing them, ammunitions, powder, clothing of a military character, etc., while conditional, occasional or relative contraband consisted of articles such as provisions, coal, gold, etc., which were contraband or not according to circumstances. The French view, which was followed by other continental powers, deemed comparatively few articles to be contraband and held that there could not be conditional contraband articles. The same thing was either contraband or not and could not be both, i. e., contraband in one set of circumstances and innocent in another.

The unratified Declaration of London (1909) made an attempt to settle the long-drawn out controversy between the two conflicting views. It divided articles into three categories, viz., absolute contraband, conditional contraband and non-contraband.

1. Oppenheim: International Law, Vol. II, p. 799. 2. Hans Kelsen . Principles of Inernational Law, p. 79 Absolute contraband.—Goods absolutely contraband are those articles which are particularly meant for being used for the purposes of war, e.g., arms of all kinds, machinery for manufacturing them, projectiles, powder, gunmountings, cloth and equipment of a distinctively military character, harness and saddle of a distinctively military character, armour plates, war-ships, etc. Such goods carry the guilt on their face. They are articles which are of such military advantage to the enemy as would warrant a belligerent to capture them. Grotius, therefore, rightly took the view that a neutral furnishing such absolute contraband articles to a belligerent became "of the party of the enemy." Such goods can be condemned and confiscated whether the carriage of the goods is direct or entails trans-shipment of subsequent transport by land.

Conditional Contraband.—Goods conditionally contral and are those articles which may be used for purposes of war as well as of peace. They are articles such as foodstuffs, forage and grain, clubing, fabrics, gold and silver in coin or bullion, vehicles, boats, railway material, fuel, harness and saddlery, etc. Such articles were liable to capture if destined for the armed forces of a belligerent or found on board a vessel bound for a territory belonging to or occupied by the enemy, and when they were not to be discharged in an intervening neutral port.

Non-Contraband. – Non-contraband or free articles included raw cotton, wool, silk, jute, oil seeds, rubber, raw hides, manures, Chinaware, clocks and watches, fashion and fancy goods, office furniture, etc. Such articles could not be declared contraband in any circumstances.

The Peterhoff Case.—The subject of contraband engaged the attention of the Supreme Court of America in the case of the Petrehoff where there was a shipment of contraband goods from England to Matamoras, a neutral port situated on the Mexican side of the Rio Grande, during the civil war. It was alleged that the ship intended to violate the blockade of the coasts of the Southern Confederacy, though apparently destined for a neutral port. The Court observed:

"The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes: (1) Articles manufactured and primarily or ordinarily used for military purposes in time of war; (2) Articles which may be and are used for purposes of war or peace according to the circumstances; and (3) Articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege."

Article 30 of the unratified Declaration of London lays down that absolute contraband is liable to capture if destined to territory belonging to, or occupied by, the enemy, or the armed forces of the enemy. Any kind of enemy

1. (1866' 5 Wallace, 58,

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destination is all that is required for the capture of absolute contraband articles. There is a presumption of enemy destination when the ship's papers reveal that the goods are to be discharged in an enemy's port, or delivered to his armies or warships.

Article 33 provides that conditional contraband is only liable to capture if destined either for the armed forces or a government department of the enemy State. It is essential for capture in case of conditional contraband that the articles must be destined for the armed forces of the enemy State, or one of its government departments. There is a presumption of enemy destination if the conditional contraband is consigned to a fortified place held by the enemy, to one of his bases of operations, to enemy authorities, or to a contractor in the enemy country who supplies the enemy Government with articles of the kind in question. Lawrence aptly points out that "the use to which the goods are to be put fixes their guilt or innocence; the destination is proof of the use, and the papers are proof of the destination."

Essentials of Guilt.—Lawrence sums up the essentials of guilt in the matter of contraband in the following words:

In the first place, it is transport and not bargain and sale which the law of contraband aims at. Neutral traders are free to sell arms and other contraband goods within the neutral territory to agents of the warring powers. It is only when they export such articles to one belligerent that the right of capture is acquired by his enemy.

Secondly, a belligerent destination is essential.

And, thirdly, the offence is complete the moment a neutral vessel laden with contraband leaves neutral waters for a belligerent destination. As Lord Stowell said in the case of the Imina the articles must be taken in delicto, in the actual prosecution of the voyage to an enemy's port."

According to the Declaration of London, 1909, articles intended exclusively for the use of the sick and the wounded or for the use of the carrying vessel, her crew and passengers during the voyage are immune from capture even though their destination is hostile, inasmuch as such articles are not treated as contraband.

Penalty for carrying contraband.—Articles 39 and 40 of the Declaration of London provide that not only contraband goods but also the vessel which carries them may be confiscated if the contraband reckoned by value, weight, volume or freight forms more than half the cargo. In case the goods are condemned and the vessel released she may be made liable to pay the costs and expenses incurred by the captor in respect of the proceedings in the national Prize Cou t and the custody of the ship and cargo during the proceedings. It also renders the owner of contraband goods liable to the loss of his innocent goods found on board the same vessel, but releases innocent cargo which is the property of other owners. If less than half of a vessel's cargo is contraband, she is not liable to condemnation and her master may hand over the contraband to the belligerent warship.

In practice the British and Continental countries send the captured contraband cargoes or the vessel carrying them for adjudication to a Prize Court, established by the belligerent State. If the Prize Court confirms the seizure,

<sup>1 3</sup> C. Robinson, Admiralty Reports, Vol. III, p. 167.

the cargo or the vessel is deemed to be a good prize and is confiscated to the captor's State.

It was observed by Sir William Scott in The Neutralistet<sup>1</sup> that the modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband articles. But this rule is liable to certain exceptions: Where a ship belongs to the owner of the cargo, or where the ship is going on such service, under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule.

Compensation for Lawful Seizure.—In three cases compensation is to be given when goods are lawfully seized. They are:

- 1. When a vessel is encountered at sea, her master being unaware of the outbreak of war or of the articles declared contraband.
- 2. When the master having become aware of the outbreak of war has had no opportunity of discharging the contraband; and
  - 3. When medical stores are seized under stress of urgent necessity.

The Declaration of London, 1909, did not come into force for want of ratification. During the Lirst World War Great Britain added innumerable articles to the alsolute contraband list of the Declaration of London. The impact of "total war" in the Second World War almost discarded the Declaration of London with regard to contral and articles. The old rules with regard to contraband were disregarded with impunity. A new contraband list was proclaimed by Great Britain in September 1939, which almost covered every conceivable kind of article.

The Alwaki.—In the case of the Alwaki<sup>2</sup>, there were the Alwaki and three other Dutch vessels, together with one Norwegian ship which had been shipped before the commencement of hostilities from South American ports 'to order' Hamburg or 'Rotterdam and/or Hamburg' and contained articles which were partly absolute contraband and partly conditional contraband. The ships were seized after the outbreak of the war. The Court held that in prize cases the onus is upon the claimant to put forward and establish a claim; it is not for the Crown to plead and particularize an affirmative case: the capture may be presumed to be in order until some claimant comes forward and establishes his claim. The Court condemned the goods as contraband.

Relationship between Contraband and Blockade.—The two essential elements of the conception of contraband are the character of the goods and an enemy destination. Only such goods as are on the contraband lists and intended to be imported into the enemy territory are liable to seizure and condemnation. Blockade involves "the interception by sea of the approaches to the coasts or ports of an enemy with the purpose of cutting offall his overseas communications. Its object is not only to stop the importation of supplies but to prevent export as well." The essential difference between contraband and blockade is that unlike the case of contraband, in the case of blockade of any portion of the enemy's coast or any of his ports, all merchant ships of whatever description and of whatever nationality, are subject to confiscation, no matter whether they have contraband, conditional contraband or

1. 6 C. Rob. 30.

2. Probate Division (1940), p. 215.

<sup>3.</sup> Higgins and Colombos: International Law of the Sea, 2nd Ed. p. 539.

non-contraband articles. The fact that the ship is attempting to enter or leave a blockaded port or coast is enough for its condemnation. The result is that the main difference between the law of blockade and the law of contraband, has been that the former is limited in area and the latter in scope.

The old distinction between the law of blockade and the law of contraband seems to have disappeared with the two great wars. Owing to present day character of the total war where everything is made subordinate to the overmastering dictates of war, "the law of contraband has been adapted to perform the functions of blockade, and without the narrow geographical limitations to which the old blockades were restricted. What has been done on both sides during the two great wars amounts to nothing less than an assertion of the right to destroy the whole of the sea-borne trade which serves the needs of the enemy, under whatever flag it may be carried and through whatever countries it may pass. The methods used by the opposing belligerents differed widely and the policy adopted by the Allies was technically justified as a reprisal for the illegalities committed by the enemy, but the purpose on each side was the same....."

# Doctrine of Continuous Voyage

"The doctrine of continuous voyage consists in treating an adventure which involves the carriage of goods in the first instance to a neutral port and thence to some ulterior and hostile destination, as being for certain purposes, only one transportation, with all the consequences which would attach if the neutral port had not interposed." (Pitt Cobett).

"The doctrine of continuous voyage was a legal conception formulated to prevent evasion of that limitation on neutral trade which became known as 'The Rule of the War of 1756.' This Rule declared that neutrals may not engage in time of war in a trade not open to them in time of peace."

The neutral vessels sought to evade capture of contraband goods by breaking their voyage into two parts. When they carried contraband of war to an enemy country, they would start ostensibly for some neutral port according to their papers, would land their cargo at the ostensible destination, viz., the neutral port, pay duties, if necessary, reload it and then try to reach their real destination, viz., the belligerent port. Similarly for breaking the blockade they would take as their ostensible destination some neutral port adjoining the blockaded coast and would try to reship the goods to the blockaded port from that neutral port. The application of the doctrine of continuous voyage or continuous transportation, however, foiled the attempt of neutrals to evade the rule with regard to contraband of war or blockade. The doctrine laid down that goods which would be contraband if carried to an enemy port could be intercepted as contraband even though they were being carried ostensibly to a neutral port, if they are really intended to be forwarded either by land or by sea from the neutral port to a hostile destination.

For the application of the doctrine of continuous voyage, there must therefore be the interposition of an immediate port, dividing the voyage or transportation into at least two parts, and the vessel might be seized on the first part of such a voyage and condemned by a belligerent upon proof of the intention of the owner or master to continue the voyage.

H. A. Smith: The Crisis in the Law of Nations, p. 59.
 O. H. Mootham: The Doctrine of Continuous Voyage, 1756-1815: The British Year Book of International Law, 1927.

Applicability of Continuous Voyage to Blockade, Contraband and Ur neutral Service.-"The doctrine of continuous voyage", observes Hyde, "offered a device which was employed by the Prize Courts to frustrate evasion by neutral traders of belligerent prohibitions such as those forbidding participation in the colonial trade of the enemy, or the carrying of contraband to its territory, or the attempting to break a blockade of its coasts.

"The examination into the continuous nature of voyages is, or may be, necessary in reference alike to blockade, trade with enemies, unneutral service, and carrying contraband, and, indeed, to all cases where the destination of the vessel or cargo is material... Examinations into continuity of voyages occur chiefly where a subject of the capturing power is supposed to be trading with the enemy, or a neutral to be sending contraband goods to the enemy, or under what is called the 'Rule of 1756'... It also becomes important in case of suspicion of an intent to break blockade. If a cargo is destined to be carried through blockade, it can be captured at any stage of the voyage. A neutral destination will often be interposed in such case, with all the ceremonies of landing, trans-shipping, sale, etc., as in the case of contraband; and the same tests and principles of reasoning apply to both." [Cf. Wheaton: Elements of International Law, 1936 Ed., pp. 558-560].

The doctrine has, therefore, been applied in cases of prohibited trade; cases of blockade; and cases of contraband. The Rule of the War of 1756, discussed shortly after, enabled the belligerents to prohibit neutrals from carrying on a trade closed to them in time of peace. As regards the application of the doctrine to blockade, it permitted the cargo to be captured at any stage of the voyage if the same was destined to be carried through blockade. The doctrine was applied to blockade in the case of The Maria Monses' and in that of The Charlotte Sophia.2 The doctrine has also been applied to cabotage or the coasting trade : The Ebenezers, The Martha Van Comminga.4

With respect to contraband Art. 39 of the Declaration of London provided that "absolute contraband" was liable to capture if destined to territory belonging to or occupied by the enemy or to his armed forces, it being immaterial whether the carriage of the goods was direct, or entailed trans-shipment or even a subsequent transport by land.

Leading Cases on Continuous Voyage.-Lord Stowell explained the principles of continuous voyage in the case of the Maria in the following words:

> "It is an inherent scaled principle that the mere touching at any port without importing the car o into the common stock of the country, will not alter the nature of the voyage, which continues the same in all respects, and must be considered as a voyage to the country to which the vessel is actually going for the purpose of delivering the cargo at the ultimate port."

In the Polly' Sir William Scott observed: "If an American (the neutral in question) is not allowed to carry on this trade directly, neither can be be allowed to do it circuitously."

<sup>1. (1805) 6</sup> C. R. 201.

<sup>2. (1806)</sup> C. R. 204. 3. 6 C. R 250. 4. 35 Apr. 66.

<sup>4 35</sup> Anr. 66. 5. (1799) 5 C. Rob. 368. 6. (1800) 2 C. R. 362, 363.

In the Bermuda.1 which was captured on a voyage from England to Nassau, an interposed neutral destination was held insufficient to exonerate the ship, and the liability to arrest was held to attach to the first section of the voyage, as to the last, and even although the last section was to be performed by another vessel. The Court observed:

> "It makes no difference whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by trans-shipment at Nassau, if trans-shipment was intended, for that could not break the continuity of transportation of the The interposition of a neutral port, between neutral departure and belligerent destination, has always been a favourite resort of contraband carriers and blockade runners. avails them when the ultimate destination is ascertained. transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppages or trans-shipment intervene."

In the Spingbok2 the Supreme Court of the United States condemned the cargo of a British vessel captured en route to Nassau because the character of the cargo left no room for doubt that its true destination was a blockaded port.

In the Peterhoff3 the doctrine was carried to the farthest extent when the alleged ulterior destination of the contraband cargo was applied to land trans-

The United States applied the doctrine of continuous voyage even to a blockaded port where there was an intention that the cargo after being landed at the neutral port was to be sent forward to the blockaded port by the same or another ship.

Although the principles of continuous voyage were accepted in the main by the nations, there existed diversity of opinion with regard to the conditions under which contraband was liable to capture. In the United States contraband goods discharged in a neutral port when they were to be forwarded to an enemy port for Lelligerent uses were freely captured as if they were forwarded direct by a single voyage to the enemy port. The doctrine was accepted by the French Prize Courts during the Crimean War, by the United States Supreme Court during the American Civil War and by Great Britain during the South African War. The Continent of Europe, however, did not accept this doctrine and insisted only on the acceptance of absolute and conditional contraband lists. Accordingly the unratified Declaration of London of 1909 evolved a compromise whereby the doctrine of continuous voyage was fully maintained as regards absolute contraband and it was declared that it was immaterial whether the carriage of goods was direct or entailed trans-shipment, or a subsequent transport by land; but it was not applied to the carriage of conditional contraband except in the rare cases where the ultimate destination was a belligerent country with no sea-board or coast-line. The Declaration of London, 1909, also laid down that whatever may be the ulterior destination of a vessel or of her cargo, she could not be captured for breach of blockade if, at the moment, she was on her way to a non-blockaded port. The Declaration, however, remained unratified and during the two world wars the above rule

 <sup>3</sup> Wallace, 551.

 <sup>(1856) 5</sup> Wallace, 1.
 (1866) 5 Wallace, 56

was flagrantly violated inasmuch as the doctrine of continuous voyage was applied to the carriage of conditional as well as absolute contraband.

In the First World War the British Courts extended the doctrine of continuous voyage much beyond the rule laid down in the Declaration of London. In the case of the Kim¹ the ship along with three other Norwegian vessels, together with one Swedish ship, was proceeding from New York to Copenhagen with large cargoes of food-stuffs. The Kim was partly laden with hides and partly with rubber. The vessels were captured by British forces in November 1914 and their cargoes seized as conditional contraband, except for the rubber of the Km which was seized as absolute contraband. Sir Samuel Evans in delivering the judgment observed that "the doctrine of continuous voyage, or transportation, both in relation to carriage by sea and to carriage over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognized legal decisions, and with the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare." With regard to the partial immunity of conditional contraband articles granted by the Declaration of London the learned Judge disagreed with the compromise reached at the conference and observed:

"As is usual in compromises, there seems to be an absence of logical reason for the exclusion. If it is right that a belligerent should be permitted to capture absolute contraband proceeding by various voyages or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which, though not absolutely contraband, become contraband by reason of a further destination to the enemy Government or its armed forces? And with the facilities of transportation by sea and by land which now exist the right to a belligerent to capture conditional contraband would be of a very shadowy value if a mere consignment to a neutral port were sufficient to protect the goods. It appears also to be obvious that in these days of easy transit, if the doctrine of continuous voyage or continuous transportation is to hold at all, it must cover not only voyages from port to port at sea, but also transport by land until the real, as distinguished from the merely ostensible, destination of the goods is reached."

The learned Judge concluded that the cargoes were not destined for consumption or use in Denmark or intended to be incorporated into the general stock of that country by sale or otherwise and that Copenhagen was not the real bona fide place of delivery but that the cargoes were on their way at the time of capture to German territory as their actual real destination. It was observed that "contraband articles are said to be of an infectious nature, and they contaminate the whole cargo belonging to the same owners. The innocence of any particular article is not usually admitted to exempt it from the general confiscation."

Rule of the War of 1756.—The doctrine of continuous voyage is generally regarded as connected with the application of the "Rule of the Wa. of 1756," which enabled the belligerents to prohibit neutrals from carrying on a trade closed to them in time of peace. During the Seven Years' War with England, France finding that the naval superiority of England did not enable her to carry on her colonial trade permitted the Netherlands, which was neutral, to carry on that trade by license. The British Government ordered the seizure of Dutch ships with their cargoes on the ground that they had

<sup>1. (1915)</sup> Probate, Division, p. 215.

incorporated with the enemy's merchant-marine and were as such liable to capture. The English Courts refused to allow such traffic, holding that a neutral, by engaging in time of war in a trade closed to him in time of peace, rendered services to a belligerent which were inconsistent with a neutral's duty of impartiality. Shorn of all detail, the Rule of 1756 expressed the practice—in fact older than 1756—that the innocent but ordinarily closed trade in time of peace between one port of a belligerent and another such port or between the mother country and one of her colonies was not allowed by the other belligerent to be carried on by neutral vessels. Lord Stowell observed in the case of the Immanuel that where coasting or colonial trade is prohibited to neutrals in time of peace and opened during war, neutrals engaging in such trade incorporate themselves in enemy's merchant-marine and are liable to either enemy. The Rule of 1756 was later adopted by America and Japan. The unratified Declaration of London did not express any view on the Rule of 1756, and left it unsettled. (Art. 57).

### CHAPTER LV

### UNNEUTRAL SERVICE

Its Meaning.—The term "unneutral service" denotes "acts sometimes performed by neutrals which involve an entry for the time being into the service of a belligerent, and the doing for him what is of direct advantage to him in his war." (Lawrence). Such unneutral service is rendered by neutral vessels by giving material assistance to a belligerent. The other belligerent State has a right to inflict on them penalty varying according to the immensity of the unneutral act. For example, if a private vessel of a neutral State carries troops of one belligerent or transmits by radio military intelligence for his use, it is doing unneutral service and is liable to be destroyed at sight. Similarly, if a neutral vessel lays mines or is carrying commercial goods from one place to another in the interest of one belligerent, it carries with it the liability of being sunk at sight in the former case or being captured and condemned as a prize in case of the latter.

The Declaration of London.—The Declaration of London (1909), which could not be enforced for want of ratification, declared for the first time a coherent law on unneutral service. Article 45 provided that, if a neutral vessel was on a voyage specially undertaken with a view to either (a) the transport of individual passengers who were embodied in the armed forces of the enemy, or (b) the transmission of intelligence in the interest of the enemy, the vessel was liable to condemnation if the service was rendered knowingly, though it need not necessarily be an exclusive service. The vessel and the goods on board belonging to the same owners were also liable to condemnation, if to the knowledge of the owner, the charterer, or the master, the vessel was transporting a military detachment of the enemy, or one or more persons who, in the course of a voyage, directly assisted the operations of the enemy. But the vessel was not liable to condemnation if there was ignorance of the outbreak of hostilities, or lack of opportunity for discharging passengers after becoming aware of it. Article 47, however, provided that the belligerent cruiser might demand the surrender as prisoners of war of any individual embodied in the armed forces of the enemy found on board a neutral merchant vessel, even though there might be no ground for the capture of the vessel and the vessel may be allowed to go on her way. Article 46 provided that unneutral services of the graver and more serious kind rendered

<sup>1. (1799) 2</sup> C. Rob. 186.

the vessel and any goods on board belonging to her owner liable to confiscation by placing her in the position of a captured enemy merchantman. Such cases arose when a neutral vessel took a direct part in hostilities or was under the orders or control of an agent placed on board by the enemy government, or when the neutral vessel was in the exclusive employment of the enemy government, or when the vessel was exclusively engaged in transporting troops or intelligence in the enemy interests.

Article 47 of the unratified Declaration of London provided for removal from the neutral ship of only persons incorporated in the enemy forces, i. e., soldiers or sailors on board, but this rule was given a go-by both in the First and Second World Wars. In November, 1914, the British Government as a measure of reprisal ordered enemy reservists on neutral vessels to be made prisoners of war, which, in effect, applied to all enemy subjects of military age. Again, in January 1940, a British cruiser took off the German civilians of military age from a Japanese vessel Asama Maru.

Other terms.—Hall styles unneutral service as "analogues of contraband" Holland uses the expression "Enemy Service", while French text-writers call it as "Assistance Hostile." Oppenheim preferred Hall's phrase, though he used the term "Unneutral Service" because it had been officially adopted in the translation of the Declaration of London.

Unneutral Service and Contraband .- Unneutral service essentially differs from contraband in the following respects: In the first place, as Lawrence points out, "there is a difference in the character of the acts themselves. What takes place in cases of contraband is done purely as a matter of trade. Its subjects are commodities and its object gain. In unneutral service the acts are not acts of ordinary commerce. Their predominant attributes are warlike rather than mercantile," i. e., carrying non-military individuals in the service of the enemy, transmission of political despatches, etc. In other words, contraband consists of certain goods only; but in unneutral service there is also the carriage of persons and despatches for the enemy. In the second place, for legal confiscation of the contraband merchandise enemy destination is essential in case of contraband while destination is immaterial in unneutral service. It is the nature of the mission which is important in unneutral service. Hyde also observes that hostile destination proof of which plays so important a part in the treatment of contral and need not always be shown to exist in order to justify interference with the carriage of enemy military persons ; for the right to intercept them may, in the particular case, rest upon the nature of their mission or upon the actual conduct while in transit. In the third place, there is a difference in the penalty also. Unlike contraband, cargo is confiscated only in rare instances in cases of unneutral service. In contraband the noxious cargo is primarily confiscated and the vessel is condemned in aggravated cases. In the case of unneutral service the confiscation of the vessel takes place primarily along with any unlawful things she may be carrying, but not generally of the cargo except in aggravated cases. In the tast place, Oppenheim distinguishes by pointing out that carriage of contraand need not necessarily, and in most cases in practice does not, take place in the direct service of the enemy, while in unneutral service carriage of persons and despatches for the enemy usually takes place in the direct service of the enemy and consequently represents much more Intensive assistance to him, and a much more intimate connection with him, than carriage of contraband.

Unneutral Service and Hostile Service. - Unneutral service may also be distinguished from hostile service. The case would be of unneutral service where the service is only partial, e.g., where the vessel was engaged in carrying military persons or despatches concurrently wih her employment partly of an innocent character. Article 46 of the unratified Declaration of London (1909) enumerates four instances of hostile service where the neutral vessel acquires enemy character and may be treated as such. They are: (i) when a neutral vessel takes a direct part in hostilities; (ii) when she is under the orders or control of an agent placed on board by the enemy government; (iii) when she is in the exclusive employment of the enemy government; and (iv) when she is exclusively engaged in the transport of enemy troops or the transmission of intelligence in the interests of the enemy. The stress is in each case on the exclusiveness of the engagement. Such unneutral services are of the graver and more serious kind and render the vessel and any goods on board belonging to her owner liable to confiscation and place her in the position of a captured enemy-merchantman.

Case Law.—A few cases on the subject may be noticed. In the case of the Orozembo, 1 it was an American ship, which, during the war with Great Britain and Holland in 1807, was carrying three senior Dutch military officers and two Dutch civil servants to Batavia on the orders of the Government of Holland. In the course of the voyage she was captured by the British. It was held that the vessel was a transport which was in the service of the enemy, and liable to condemnation. As regards the number of military persons to constitute such a case, it was said that number alone is an insignificant circumstance in the considerations on which the principle of law on this subject is built; since fewer pesons of high quality and character may be of more importance than a much greater number of persons of lower condition.

The American vessel Friendship,2 was condemned in 1807 for having, under contract with the French Government, undertaken to transport French military officers and marines. It was held that a vessel hired by the enemy for the conveyance of military persons is to be considered as transport subject to condemnation.

The case of the Atalanta's furnishes an instance of transmission of . intelligence-to the enemy. It was a neutral ship (a Bremen ship), carrying a packet containing despatches hidden in a tea chest from the Government of the Isle de France to the minister of marine at Paris. These despatches were being taken within the knowledge of the captain of the neutral ship. The ship was captured by the British Government. Both the ship and the cargo were condemned by a British Prize Court. It was held that the carrying of despatches was a service, which, in whatever degree it existed, could only be considered in one character-as an act of the most hostile nature and the vehicle in which they are carried must also be confiscated.

In the Affair of the Trent, the British mail steamer Trent was stopped on its way from Habana to St. Thomas by an American cruiser San Facinto in 1861 during the American Civil War, and two of its passengers, Mason and Slidell, who were proceeding as envoys of the Southern Confederacy to Great Britain and France, were forcibly removed along with their two secretaries. The United States contended that since despatches were clearly contraband, the bearers or couriers who undertook to carry them fell under the same

 <sup>(1807) 6.</sup> C. Rob. 430.

<sup>2. (180°) 6</sup> C. Rob. 420. 3. (18(8) 6 C. Rob. 440.

category. Great Britain, on the other hand, repelled the contention of U. S. A. by observing that the character and office of the person captured didnot make them contraband, inasmuch as they were being sent out as envoys to neutral powers and the seizure was unjustified as a neutral State had absolute right to maintain diplomatic relations with the belligerents. She further alleged that the act of the United States was "an affront to the British flag and a violation of International Law." After protracted negotiations the United States released the prisoners and the law of contraband was held inapplicable to their case.

In the well-known case of the S. S. China, which was an American mail and passenger ship sailing between Shanghai and the American ports, there were in 1916 on board the ship several German, Austrian and Turk passengers who were bound for Manila. A British cruiser Laurentic on inspection removed these passengers. The Washington Government entered a strong caveat on the ground that the persons did not fall within Article 47 of the Declaration of London, which allowed the capture of persons belonging to the army and navy only. The British Government replied that these persons were carrying on subversive activities, being engaged in the sinuggling of arms. While this controversy had not yet been settled, the United States entered war and the prisoners were released.

In the case of the Asama Maru, which was a Japanese vessel on voyage from an American port Honolulu to the Japanese port of Yokohoma, she had on board some German civilians. The incident took place during the Second World War in January 1940 when Japan was a neutral. When the Asama Maru was about to enter the Japanese territorial waters she was seized by a British cruiser, who took off 21 German civilians from the ship. On a protest made by Japan against the detention of the civilians, the British Government pleaded that under the German Army Code, every German male from the age of 18 years up to the age of 45 years must bear arms for the country and, therefore, these 21 German civilians, mostly of military age, were in the position of contraband, because if and when they could go to Germany they would have to serve in the German Army. The Chamberlain Government subsequently released 9 out of 21 German detenues on the ground that they were relatively unsuitable for military service.

# THE RIGHT OF VISIT AND SEARCH

Object.—Hyde observes that in theory "the object of visit and search is to place information, chiefly concerning neutral ships, within the reach of the belligerent whose warships encounter them in order that it may exercise the full measure of its rights as such in the light of information that may thus be disclosed."

Belligerent Right.—"The right of visitation and search of neutral vessels at sea is a belligerent right, essential to the exercise of the right of capturing enemy's property, contraband of war and vessels committing a breach of blockade." The right may be exercised over private vessels only either on open sea or in belligerent waters but never in neutral waters. The right is exercisable by all warships and military aircraft of belligerents after the outbreak and before the end of war in the maritime or territorial belt of either belligerent, on the open sea and in the territorial waters of an ally, if the latter has consented. Wheaton observes that "even if the right of capturing enemy's property be ever so strictly limited, and the rule of free ships free goods be adopted, the right of visitation and search is essential, in order to determine whe ther the ships themselves are neutral, and documented as such, according to the law of nations and treaties; for, as Bynkershoek observes, "it is lawful to detain a neutral vessel in order to ascertain, not by the flag merely, which may be fraudulently assumed, but the documents themselves on board, whether she is really neutral."

Visit.—After the vessel has been stopped, it it visited by an officer or two of a belligerent warship. The purpose of the visit is to ascertain the nationality of the vessel, the character of her cargo and passengers and the port from which, and the destination to which, she is sailing. This is usually done by examining the papers of the vessel, e. g., passport, muster roll, the log-book, bill of lading, etc., either on board the vessel or by summoning the master of the merchantman with his papers on board the belligerent warship.

Search.—If an examination of the shipping papers reveals that the vessel is carrying contraband or rendering unneutral services she is immediately seized. But if it only throws suspicion against the vessel, search is made by an officer or two of the belligerent warship in the presence of the master of the vessel. No damage need be caused to the vessel or cargo. If the search clears the suspicion against the vessel she is allowed to continue her voyage. But if it confirms the presence of contraband or her engagement in unneutral service, the vessel is seized. If the vessel is brought to the port for search, full indemnity must be paid for loss of time, etc., if she is ultimately found innocent.

In carrying search no undue delay or inconvenience is to be caused to the vessels searched and all necessary courtesy and consideration should be accorded to them.

Resistance to Search.—Article 63 of the Declaration of London, 1909, provided that forcible resistance to the belligerent exercise of the right of stoppage, search, and capture, involved in all cases the condemnation of the vessel.

Convoys.—Convoys are ships of war protecting and escorting merchant ships. Except Great Britain there is almost unanimity of opinion that convoyed vessels should not be searched by reposing confidence in the good faith of neutrals, who in a sense guarantee by placing the vessels under convoy of their public ships that they are not engaged in any unlawful traffic inconsistent with their neutrality. This view is fortified by Art. 61 of the unratified Declaration of London (190) which ays down that neutral vessels under the convoy of warships of their ownnationality are exempt from search, provided that the commander of the convoy furnishes written inform-

ation regarding the character of the ships and cargoes, when demanded by the commander of a belligerent warship. If the information conveyed by the commander of the convoying ship does not satisfy the commander of the belligerent warship, and he thinks that the confidence of the neutral warship is being abused, he may express his suspicions to the neutral commander, who must personally investigate the matter and should report his findings to the belligerent commander. If the commander of the convoying ship after investigation comes to the conclusion that the ship carries contraband or the investigation otherwise justifies the capture of the ship, the convoy must withdraw the protection and allow its seizure. If, however, the result of the investigation by the convoying commander is not to the satisfaction of the commander of the belligerent warship, the matter can only be settled by diplomatic intercourse.

The national convoy of a warship only grants immunity to its merchant vessels and the convoy of a warship of another neutral State does not extend immunity to the merchant vessel from search. When a neutral merchantman accepts the convoy of a belligerent, it becomes liable to condemnation on the ground of hostile association and an implied intention to resist visit and search.

Public and Private Ships.—There is also a distinction between public and private vessels of a nation in the matter of visitation and search. In respect of its public vessels it is agreed on all hands that neither the right of visitation and search nor any other belligerent right can be exercised on board such a vessel on the high seas. A public vessel belonging to an independent sovereign is exempt from visitation and search even within the territorial jurisdiction of another State. The right of visitation and search, therefore applies only to private vessels which are neutral merchantmen, and not to public vessels.

Lawrence while explaining the rule regarding visit and search points out that all jurists agree that the right of search belongs to belligerents, and to belligerents only and, as Judge Story said in the case of the... Marianna Flora, it is allowed by the general consent of nations in time of war and limited to those occasions; that the right can be exercised on merchantmen only who are bound to submit to search from a lawfully commissioned belligerent cruiser; that though neutral ships of commerce must submit to belligerent search, neutral men-of-war are free from it; and that a belliger ent vessel may chase under false colour or without colours of any kind, but before it commences the actual work of visit and search it must hoist its country's flag.

The right of visit and search was approved by the Permanent Court of Arbitration in the Carthage case<sup>2</sup> where it was observed that "according to the principles unversally acknowledged, a belligerent warship has, as a general rule and, except under special circumstances, the right to stop a neutral commercial vessel in the open sea and proceed to search it to see whether it is observing the rules of neutrality, especially as to contraband,"

The leading case on the subject is that of the Maria<sup>3</sup> where the right of visitation and search was attempted to be resisted by the interposition of a convoy of Swedish ships of war. The Maria was a Swedish merchantman,

(1918), XIII, p. 216.
 (1799) I C. Rob. 340.

<sup>1.</sup> Wheaten: Reports of the Supreme Court, Vol. XI, p. 1.

sailing under the convoy of a Swedish man-of-war. Great Britain being at war with France, a British squadron proposed to exercise the right of visit and search, which was forcibly resisted by the convoying vessel. She was condemned by the British Prize Court on the ground of sharing impliedly in the resistance offered by the frigate (a ship of war with great fighting power. In delivering the judgment of the High Court of Admiralty, Lord Stowell laid down the following three principles of law:

- 1. That the right of visiting and searching merchant 'ships on the high seas, whatever be the ships, the cargoes, the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. "I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships or the destination are; and it is for the purpose of ascertaining these points that the necessity of visitation and search exists."
- 2. That the authority of the neutral sovereign being forcibly interposed cannot legally vary the rights of a lawfully commissioned belligerent cruiser.
- That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search.

The judgment of condemnation pronounced in this case was followed by the treaty of armed neutrality, entered into by the Baltic powers in 1800, and the points in controversy were adjusted by the Convention of the 5th June, 1801, under which the right of search as to merchant vessels sailing under neutral convoy was modified by limiting it to public ships of war of the belligerent party, excluding private armed vessels. A little more than hundred years later, the controversy was set at rest by the Declaration of London (1909), which held against the British claim. The Declaration of London, as discussed earlier, laid down that neutral vessels under their national convoy were exempt from search.

It was observed by Sir William Scott<sup>1</sup> that "if a neutral master attempts a rescue, or to withdraw himself from search, he violates a duty which is imposed upon him by the law of nations, to submit to search, and to come in for inquiry as to the property of the ship or cargo; and if he violates this obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the whole property entrusted to his care, and thus fraudulently attempted to be withdrawn from the operation of the rights of war. With an enemy master the case is very different; no duty is violated by such an act on his part and if he can withdraw himself he has a right so to do."

When Vessel and Cargo are liable to condemnation.—If the vessel of the neutral power resists the visit and search or if the visit and search reveals that the neutral vessel is engaged in illicit act of aiding the enemy or if true character of the vessel cannot be determined due to absence of papers, the neutral vessel together with the cargo on it is liable to be captured and condemned after adjudication by a Prize Court. Neutral prize ought not to be destroyed unless there are exceptional circumstances, and, if destroyed, compensation must be paid to the victim. Even when destruction is allowed the enemy persons on board the ship must be placed in safety.

<sup>1.</sup> The Catharina Elizabeth, 5 C. Rob. 232.

Practice during World Wars.— Originally the right of visit and search was hedged in with severe restrictions so as to give the least inconvenience to neutrals. But the two world wars gave a go-by to these salutary conditions. The exigencies of total war enabled the belligerents to intercept neutral vessels on the high seas with impunity and, without even preliminary examination of the ship's papers, the vessels were sent to port for a thorough examination, thereby causing considerable delay and inconvenience to neutral vessels. The British practice of searching neutral vessels in port instead of on the high seas received adverse comments from jurists and other independent writers on the subject, but Britain justified the continuance of the same on the ground of danger from sub-marines during the course of the search and the growth in size of cargo vessels.

### APPENDICES

A .- The Geneva Conventions of August 12, 1949.

B .- The Hague Conferences.

C .- Leading Cases.

D.-Charter of the United Nations.



#### APPENDIX A

# The Geneva Conventions of August 12, 1949

History of the Conventions.—The International Committee of the Red Cross has throughout been the sponsor of the Geneva Convention for the protection of wounded military personnel and of the humanitarian conventions supplementing it. The Second World War ending in 1945 witnessed an era of unprecedented massacre of civilian population, and there arose the task of perfecting the humanitarian content of international public law in the light of the experience gained.

The International Committee set on its work by collecting preliminary information on such aspects of international public law that required confirmation, enlargement, or amendment and then submitted the new draft-based on the revision of the three former Conventions, the Geneva Convention of 1929 for the relief of the wounded and sick in armies in the field, the Xth Hague Convention of 1907 for the adaptation to maritime warfare of the principles of the Geneva Convention, and the 1929 Convention, on the treatment of prisoners of war-to an International Red Cross Conference and finally to a Diplomatic Conference empowered to give these treaties final validity. The International Red Cross Conference sat in Stockholm from August 20 to 31, 1948, and was composed of the representatives of fifty Governments and fifty-The "Diplomatic Conference for the two National Red Cross Societies. Establishment of International Conventions for the Protection of Victims of the War" was convened by the Swiss Federal Council, as trustee of the Geneva Conventions, at Geneva and was held from April 21 to August 12, Sixty-three Governments were represented at the Conference.

Earlier Conventions.—The First Geneva Convention, created by the International Committee of the Red Cross in 1864, has been the source of the present Geneva Convention relating to Wounded and Sick in Armed Forces. It was revised at Diplomatic Conferences of 1906 and 1929.

The Second Geneva Convention was adopted at the Diplomatic Conference held at Geneva in 1868. The Conference formulated provisions for adopting the principles of the Geneva Conventions to maritime warfare. This Convention was not ratified, but later became the Hague Convention of 1899, and afterwards the Xth Hague Convention of October 18, 1907, which was ratified by forty-seven States. The Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Ship-wrecked Members of Armed Forces at Sea was an extension of the First Geneva Convention on the Wounded and Sick by applying the same to maritime warfare.

The Third Geneva Convention of 1929 dealing with Prisoners of War is the basis of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 194). The earlier Convention consisted of 97 Articles, whereas the present has 143 Articles. The increase in the number of Articles has been mainly due to the desire of the countries meeting at Geneva to bring within the purview of humanitarian International Law all possible contingencies.

The Fourth Geneva Convention relative to the Protection of Civilia n Persons in Time of War was drawn up by the Diplomatic Conference on August 12, 1949. It adds nothing new but ensures the dignity of human person even in the midst of hostilities. The Regulations concerning the Laws and Customs of War on Land, annexed to the Fourth Hague Convention of 1907, did not specifically provide for civilians save where the enemy armed forces were in the occupation of a territory.

Geneva Conventions, 1949.—Four Conventions were concluded at Geneva on August 12, 1949. They are (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; (2) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Ship-wrecked Members of Armed Forces at Sea; (3) Geneva Convention Relative to the Treatment of Prisoners of War; and (4) Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.—The Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Geneva Convention for the Relief of the Wounded and Sick in Arms in the Field of July 27, 1929, agreed to the following, among other, provisions.

Wounded and Sick.—Under Article 12 of Chapter II members of the armed forces who are wounded or sick shall be respected and protected in all circumstances. They shall be treated humanely and cared for by the party to the conflict in whose power they may be. Women shall be treated with all consideration due to their sex.

The wounded and sick of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law covering prisoners of war shall apply to them. (Art. 14).

At all times, and, particularly after engagement, parties to the conflict shall without delay take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled. (Art. 15).

Parties to the conflict shall record in respect of each wounded, sick or dead person of the adverse party falling into their hands any particulars which may assist in his identification. (Art. 16).

Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. Bodies shall not be cremated except for imperative reasons of hygiene or for motive based on the religion of the deceased. Parties to the conflict shall ensure that the dead are honourably interred, if possible according to the rites of the religion to which they belonge I. (Art. 17).

Medical Units and Establishments.—Under Article 19 of Chapter III fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the parties to the conflict.

Personnel.—Under Article 24 of Chapter IV medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively

engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.

Buildings and Material.—Under Article 33 of Chapter V the material of mobile units of the armed forces which fall into the hands of the enemy, shall be reserved for the care of wounded and sick.

Medical Transports.—Under Article 35 of Chapter VI transports of wounded and sick or of medical equipment shall be respected and protected in the same way as medical units.

Medical aircraft, that is to say, aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment, shall not be attacked, but shall be respected by the belligerents, while flying at heights, times, and on routes specifically agreed upon between the belligerents concerned. (Art. 36).

The Distinctive Emblem.—Under Article 44 of Chapter VII the emblem of the Red Cross on a white ground and words "Red Cross", or "Geneva Cross" may not be employed except to indicate or to protect the medical units and establishments.

Execution of the Convention.—Under Article 46 of Chapter VIII reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited.

Repression of Abuses and Infractions.—Under Article 49 of Chapter IX the High Contracting Parties have undertaken to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed, any of the grave breaches of the present Convention.

2. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.—
The Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21, to August 12, 1949, for the purpose of revising the Xth Hague Convention of October 18, 1907, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906, agreed to the following, among other, provisions.

Wounded, Sick and Shipwrecked.—Under Article 12 of Charter II the members of the armed forces, and other protected persons who are at sea and who are wounded, sick or shipwrecked shall be respected and protected in all circumstances, it being understood that the term "shipwreck" means shipwreck from any cause and includes forced landings at sea by or from aircraft. Such persons shall be treated humanely and cared for by the parties to the conflict in whose power they may be.

All warships of a belligerent Party shall have the right to demand that the wounded, sick or shipwrecked on board military hospital ships, and hospital ships belonging to relief societies or to private individuals, as well as merchant vessels, yachts and other craft shall be surrendered, whatever their nationality, provided that the wounded and sick are in a fit state to be moved and that the warship can provide adequate facilities for necessary medical treatment. (Art. 14).

The wounded, sick and shipwrecked of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of International Law concerning prisoners of war shall apply to them. (Art. 16).

After each engagement, Parties to the conflict shall without delay take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled. (Art. 18).

Parties to the conflict shall ensure that burial at sea of the dead, carried out individually as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies with a view to confirming death, establishing identity and enabling a report to be made. (Art. 20).

Hospital Ships.—Under Article 22 of Chapter III military hospital ships may in no circumstances be attacked or captured, but shall at all times be respected and protected. (Art. 22).

Any hospital ship in a port which falls into the hands of the enemy shall be authorised to leave the said port. (Art. 29).

The Parties to the conflict shall have the right to control and search the hospital ships. They can refuse assistance from these vessels, order them off, make them take a certain course, control the use of their wireless and other means of communication, and even detain them for a period not exceeding seven days from the time of interception, if the gravity of the circumstances so requires. (Art. 31).

Hospital ships are not assimilated to warships as regards their stay in a neutral port. (Art. 32).

Merchant vessels which have been transformed into hospital ships cannot be put to any other use throughout the duration of hostilities. (Art. 33).

Personnel.—Under Article 36 of Chapter IV the religious, medical and hospital personnel of the hospital ships and their crews shall be respected and protected; they may not be captured during the time they are in the service of the hospital ship, whether or not there are wounded and sick on board.

The religious, medical and hospital personnel assigned to the medical or spiritual care of the protected persons shall, if they fall into the hands of the enemy, be respected and protected; they may continue to carry out their duties as long as this is necessary for the care of wounded and sick. (Art. 37).

The Distinctive Emblem.—Hospital ships shall be distinctively marked as follows:

(a) All exterior surfaces shall be white.

(b) One or more dark red crosses, as large as possible, shall be painted and displayed on each side of the hull and on the horizontal surfaces, so placed as to afford the greatest possible visibility from the sea and from the air. (Art. 43).

Execution of the Convention.—Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protect-

ed by the Convention are prohibited. (Art. 47).

Each High Contracting Party is obliged to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches as wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health,

and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully, and wantonly, and shall bring such persons, regardless of their nationality, before its own courts. (Art. 50-52).

3. Geneva Convention Relative to the Treatment of Prisoners of War.—The Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Convention concluded at Geneva on July 27, 1929, relative to the Treatment of Prisoners of War agreed, among others, to the following provisions.

General Protection of Prisoners of War.—Prisoners of war are in the hands of the enemy power, but not of the individuals or military units who have captured them.

Prisoners of war must at all times be humanely treated. They must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited. (Arts. 12 and 13).

Captivity—Beginning of Captivity.—Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. (Art. 17).

All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war. (Art. 18).

Prisoners of war shall be evacuated as soon as possible after their capture to camps situated in an area far enough from the combat zone for them to be out of danger. (Art. 19.

Internment of Prisoners of War.—The detaining power may subject prisoners of war to internment only in premises located on land affording every guarantee of hygiene and healthfulness. (Arts. 21 and 22).

Quarters, Food and Clothing of Prisoners of War.—Prisoners of war shall be quartered under conditions as favourable as those for the forces of the detaining powers who are billeted in the same area. The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health. Clothing, underwear and footwear shall be supplied to prisoners of war in sufficient quantities by the detaining power, which shall make allowance for the climate at the region where the prisoners are detained.

Canteens shall be installed in all camps, where prisoners of war may procure for dstuffs, soap and tobacco and ordinary articles in daily use. The profits made by camp canteens shall be used for the benefit of the prisoners. (Arts. 25-28).

Hygiene and Medical Attention—The detaining power shall be bound to take all sanitary measures necessary to ensure the cleanliness and health-fulness of camps, and to prevent epidemics. Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them. (Art. 29).

Discipline.—Every prisoner of war shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power. Such officer shall have in his possession a copy of the present Convention; he shall ensure that its provisions are known to the camp staff and the guard and shall be responsible, under the direction of his Government, for its application.

Prisoners of war, with the exception of officers, must salute and show to all officers of the Detaining Power the external marks of respect provided for by the regulations applying in their own forces. Officer prisoners of war are bound to salute only officers of a higher rank of the Detaining Power; they must, however, salute the camp commander regardless of his rank. (Art. 39).

The wearing of badges of rank and nationality, as well as of decorations, shall be permitted. (Art. 40).

Officers and prisoners of equivalent status shall be treated with the regard due to their rank and age. (Art. 44).

Prisoners of war other than officers and prisoners of equivalent status shall be treated with the regard due to their rank and age.

Supervision of the mess by the prisoners themselves shall be facilitated in every way. (Art. 45).

Transfer of Prisoners of War after their Arrival in Camp.—The detaining power, when deciding upon the transfer of prisoners of war, shall take into account the interests of the prisoners themselves, more specially so as not to increase the difficulty of their repatriation. The transfer of prisoners shall always be effected humanely and in the conditions not less favourable than those under which the forces of the detaining power are transferred. (Art. 46).

Labour of Prisoners of War.—The detaining power may utilise the labour of prisoners of war who are physically fit, taking into account their age, sex, rank and physical aptitude with a view particularly to maintaining them in a good state of physical and mental health. The authorised work to which the prisoners of war may be engaged, besides work connected with camp administration, installation or maintenance, are in connection with agriculture, industries connected with the preduction or the extraction of raw materials, and manufacturing industries, transport and handling of stores which are not military in character or purpose, commercial business, and arts and crafts, domestic service and public utility services having no military character or purpose. (Arts. 49 and 10).

Prisoners of war must be granted suitable conditions, especially as regards accommodation, food, clothing and equipment. (Art. 51)

Working Pay.—The working pay due to prisoners of war shall be fixed in accordance with the provisions of Art. 62 of the present Conventions. (Art. 54).

Financial Resources of Prisoners of War: Advances of Pay.—The detaining power shall grant all prisoners of war a monthly advance of pay, the amount of which shall be fixed by conversion, in the currency of the said Power, of the following amounts:—

Category I : Prisoners ranking below sergeants; eight Swiss francs.

Category II: Sergeants and other non-commissioned officers, or prisoners of equivalent rank: twelve Swiss francs.

Category III : Warrant officers and commissioned officers below the rank

of major or prisoners of equivalent rank: fifty Swiss francs.

Category IV: Majors, lieutenant-colonels, colonels or prisoners of equiva-

lent rank: sixty Swiss francs.

Category \ : General officers or prisoners of war of equivalent rank:

Seventy-five Swiss francs.

However, the parties to the conflict concerned may by special agreement modify the amount of advances of pay due to prisoners of the preceding categories.

Furthermore, if the amounts indicated in the first paragraph above would be unduly high compared with the pay of the Detaining Power's armed forces or would, for any reason, seriously embarrass the Detaining Power, then, pending the conclusion of a special agreement with the Power on which the prisoners depend to vary the amounts indicated above, the detaining power—

(a) shall continue to credit the accounts of the prisoners with the amounts indicated in the first paragraph above;

(b) may temporarily limit the amount made available from these advances of pay to prisoners of war for their own use, to sums which are reasonable, but which for Category I, shall never be inferior to the amount that the detaining power gives to the members of its armed forces.

The reasons for any limitations will be given without delay to the protecting power. (Art. 60).

The detaining power shall grant all prisoners of war a monthly advance of pay in accordance with the rates given in Art. 60. They shall be paid a fair working rate of pay by the detaining authorities direct. The rate shall be fixed by the said authorities, but shall at no time be less than one-fourth of one Swiss franc for a full working day. They shall be permitted to receive remittances of money addressed to them individually or collectively. (Arts. 62 and 63.

Relations of Prisoners of War with the Exterior.—Prisoners of war shall be allowed to send and receive letters and cards. The number of letters and cards sent by each prisoner of war, if limited by the detaining power, shall not be less than two letters and four cards monthly. (Art. 71).

All relief shipments for prisoners of war shall be exempt from import customs and other dues. (Art. 74).

The censoring of correspondence addressed to prisoners of war or despatched by them shall be done as quickly as possible. (Art. 76).

Prisoners of War Representatives.—The prisoners shall elect by secret ballot every six months, prisoners' representatives entrusted with representing them before the military authorities, the Protecting I owers, the International Committee of the Red Cross and any other organization which may assist them. (\rt. 79).

Penal and Disciplinary Sanctions.—A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the detaining power. He shall be tried only by a military court, unless the existing laws of the detaining power expressly permit the civil courts to try a member of the armed forces of the detaining power in respect of the particular offence alleged to have been committed by the prisoner of war. He may not be punished more than once for the same act or on the same charge. Collective punish-

ment for individual acts, corporal punishments, imprisonment in premises without daylight and in general any form of torture or cruelty are forbidden. Arts. 82-87).

Judicial Proceedings .- No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the detaining power or by International Law, in force at the time the said act was committed.

The death sentence cannot be pronounced against a prisoner of war unless the attention of the court has been particularly called to the fact that since the accused is not a national of the detaining power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will. (Arts. 99 and 100).

The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses, and, where necessary, to the services of a competent interpreter. (Art. 105).

Termination of Captivity.-Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel. No sick or injured prisoner of war who is eligible for repatriation may be repatriated against his will during hostilities. (Art. 109). No repatriated person may be employed on active military service. (Art. 117).

Release and Repatriation of Prisoners of War at the close of Hostilities .- Prisoners of war shall be released and repatriated without delay after the cessation of a tive hostilities. In the absence of stipulations to the above effect in any agreement concluded between the parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the detaining powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down above. In either case, the measures adopted shall be brought to the knowledge of the prisoners of war. (Art. 118). On repatriation, any articles of value impounded from prisoners of war shall be restored to them. (Art. 119).

Death of Prisoners of War .- ! he detaining authorities shall ensure that the prisoners of war who have died in captivity are honourably buried, if possible according to the rites of the religion to which they belonged, and that their graves are respected, suitably maintained and marked so as to be found at any time. They shall be buried in individual graves, unless unavoidable circumstances require the use of collective graves. (Art. 120.

Supervision.—Representatives or delegates of the protecting power shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war. The delegates of the International Committee of Red Cross shall enjoy the same prerogatives. (Art. 126).

4. Geneva Convention Relative to the Protection of Civilian Persons in Time of War .- The Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from 'April 21 to August 12, 1949, for the purpose of establishing a Convention for the Protection of Civilians in Time of War agreed, a nong others, to the following provisions.

Definition of protected persons.—Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. (Art. 4.

General Protection of Populations Against Certain Consequences of War.—In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the parties thereto may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organised as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven. (Art. 14).

The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect. (Art. 16).

Civilian hospitals organised to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the parties to the conflict. (Art. 18).

Persons regularly and solely engaged in the operation and administration of civilian hospitals shall be respected and protected. (Art. 20).

Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases or for the transport of medical personnel and equipment shall not be attacked. (Art. 22).

Provisions common to the Territories of the Parties to the Conflict and to Occupied Territories.—Protected persons are entitled to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. (Art. 27).

The presence of a protected person may not be used to render certain points or areas immune from military operations. (Art. 28).

The High Contracting Parties specially agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. (Art. 32).

The taking of hostages is prohibited. (Art. 34).

Aliens in the territory of a Party to the Conflict.—Protected persons who, as a result of the war, have lost their gainful employment, shall be granted the opportunity to find paid employment. (Art. 39).

Protected persons may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are. (Art. 40).

The internment or placing in assigned residence of protected persons may be ordered only if the security of the detaining power makes it absolutely necessary. (Art. 42).

Occupied Territories .- Protected persons who are in occupied territory shall not be deprived of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory. (Art.47).

The occupying power shall facilitate the proper working of all institutions devoted to the care and education of children. (Art. 50).

The occupying power may not compel pretected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted. The occupying power may not compel protected persons to work unless they are over eighteen years of age, and then , nly on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. (Art. 51).

Any destruction by the occupying power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organisations, is prohibited, except where such destruction is rendered absolutely necessary by military operations. (Art. 53.

The occupying power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience. (Art. 54).

The occupying power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate. (Art. 55).

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the occupying power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. (Art. 64).

Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence. (Art. 72).

In no case shall persons condemned to death be deprived of the right of petition for pardon or reprieve. (Art. .75).

Protected persons who have been accused of offences or convicted by the courts in occupied territory, shall be handed over at the close of occupation, with the relevant records, to the authorities of the liberated territory. (Art. 77).

Regulations for the Treatment of Internees.-The parties to he conflict shall not intern protected persons, except for security reasons or for offences which are solely intended to harm the occupying power. (Art. 79).

Internees shall retain their full civil capacity and shall exercise such

attendant rights as may be compatible with their status. (Art. 80).

Parties to the conflict who intern protected persons shall be bound to provide free of charge for theire maintenance, and to grant them also the medical attention required by their state of health. (Art. 81).

Places of Internment.—Internees shall be accommodated and administered separately from prisoners of war and from persons deprived of liberty for any other reason. (Art. 84).

Canteens.—Canteens shall be installed in every place of internment, except where other suitable facilities are available. (Art. 87).

Food and Clothing.—Internees shall be provided with rations sufficient in quantity, quality and variety to keep them in a good state of health and to prevent the development of nutritional deficiencies. They shall be given all facilities to provide themselves with the necessary clothing, footwear and change of underwear. (Arts. 89 and 90).

Religious activities.—Internees: shall enjoy complete latitude in the exercise of their religious duties, including attandance at the services of their faith, on condition that they comply with the disciplinary routine prescribed by the detaining authorities. (Art. 93).

Physical Activities.—The detaining power shall not employ internees as workers, unless they so desire. (Art. 95).

Financial resources.—All internees shall receive regular allowances, sufficient to enable them to purchase goods and articles, such as tobacco, toilet requisites, etc. Such allowances may take the form of credits or purchase coupons. (Art. 98).

Complaints and petitions.—Internees shall have the right to present to the authorities in whose power they are, any petition with regard to the conditions of internment to which they are subjected. They shall also have the right to apply without restriction through the Internee Committee or, if they consider it necessary, direct to the representatives of the Protecting Power in order to indicate to them any points on which they may have complaints to make with regard to the conditions of internment. Such petitions and complaints shall be transmitted forthwith and without alteration, and even if the latter are recognised to be unfounded they may not occasion any punishment. Periodic reports on the situation in places of internment and as to the needs of the internees may be sent by the Internee Committees to the representatives of the Protecting Powers. (Art. 101.)

Administration and Discipline.—In every place of internment, the internees shall freely elect by secret ballot, every six months, the members of a Committee empowered to represent them before the Detaining and the Protecting Powers, the International Committee of the Red Cross and any other organisation which may assist them. (Art. 102).

Relations with the Exterior.—Internees shall be allowed to send and receive letters and cards. If the detaining power deems it necessary to limit the number of letters and cards sent by each internee, the said number shall not be less than two letters and four cards monthly. (Art. 107).

All relief shipments for internees shall be exempt from import, customs and other dues. (Art. 110).

Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible. (Art. 116),

Penal and Disciplinary Sanctions.—Internees who are recaptured after having escaped or when attempting to escape shall be liable only to disciplinary punishment in respect of this act, even if it is a repeated offence. (Art. 120).

Release, Repatriation and Accommodation in Neutral Countries.— Each interned person shall be released by the detaining power as soon as the reasons which necessitated his internment no longer exist. (Art. 132).

Internment shall cease as soon as possible after the close of hostilities. (Art. 133).

Execution of the Convention.—No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of grave breaches, such as wilful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, etc. (Art. 147 and .148).

[On May 7, 1968, the United Nations Conference on Human Rights adopted at Teheran a resolution which called upon the Government of Israel to desist forthwith from acts of destroying homes of Arab civilian population inhabiting areas occupied by Israel bearing in mind the provisions of the Geneva Convention of 1 th August, 1949, regarding the protection of civilian persons in time of war.

In the Middle East War a resolution was adopted by the Security Council on June 14, 1967, which considered the urgent need to spare the civil populations and the prisoners of war in the area of conflict in the Middle East of additional sufficings and recommended to the Covernments concerned the scrupulous respect of the humanitarian principles governing the treatment of the prisoners of war and the protection of civilian persons in time of war, contained in the Geneva Conventions of 12th August, 1949. That resolution was subsequently endorsed by the U. N. General Assembly on July 4, 1967.

It will appear from a review of the provisions of the Geneva Conventions of 12th August, 1949, detailed above that deep human considerations permeate throughout them, which place an imperative duty on the parties to the conflict to gather and tend to the wounded and sick, to protect them against pillage, and to maintain established standards in the conduct of war—standards which are based on humane considerations and from which derogation is impermissible for the duration of conflict and until the restoration of peace.]

### APPENDIX B

## The Hague Conferences

The Hague Conferences are two in number, viz., one of 1899 and the other of 1907,

First Hague Conference of 1899.—The First Conference was convened on May 18, 1899, at The Hague at the instance of Emperor Nichols II of Russia. On account of the havoc caused by the constant dread of war and the huge waste involved in its preparation, he proposed an international conference for arriving at an agreement upon "the most effectual means for securing to all peoples the benefits of a real and durable peace, and, above all, for putting an end to the progressive development of the present armaments." Twenty-six States participated in the Conference, and the topics discussed were mainly two, viz. (i) the reduction of armaments and (ii) the peaceful settlement of international disputes.

Much headway could not be made with regard to the limitation of armaments. The Conference, however, evolved the Convention for the Pac ific Settlement of International Disputes, recognising arbitration as the most powerful means of settling disputes between States.

The Conference also negotiated a Convention respecting the Laws and Customs of War on Land and Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1864.

Besides the above, three declarations were also adopted, these being prohibition for a term of five years, the launching of projectiles and explosives from balloons, the prohibition of the use of projectiles destined solely for the purpose of diffusing asphyxiating or deleterious gases and the abstention from the use of bullets that expanded or flattened easily in the human body.

International Commission of Enquiry.—The first Convention of the Hague Conference of 1899 suggested the establishment of International Commission of Enquiry with a view to dispelling ignorance that might ultimately lead to hostilities. The Conference laid down that such Commissions were expedient when international disputes arose from a difference of opinion on matters of fact, and provided that they might be constituted by a special agreement between the parties.

Permanent Court of Arbitration—The Permanent Court of Arbitration exists under the two Conventions on the Pacific Settlement of International Disputes of 1899 and 1907. By Article 20 of the 1899-Convention the signatory powers undertook to organize a Permanent Court of Arbitration; by Article 41 of 1907-Convention the 'contracting powers undertook to maintain the existing Permanent Court of Arbitration "as established by the first Peace Conference." Of the forty seven States which became parties to one or both of the Conventions, more than forty are continuing to be in some way active in their support of the Court.

Second Hague Conference of 1907.—The Second Hague Conference was convened on June 15, 1907, in which forty-four States participated. The Conference produced thirteen Conventions, which are ranked in the class of pure law-n aking treatics. They are discussed below:

Hague Convention (No. 1) of 1907 for the Pacific Settlement of International Disputes.—The Convention endeavoured to induce the Signatory Powers to have recourse to good offices and mediation. Elaborate details were provided with regard to arbitration, which was regarded as the most efficacious and equitable means of determining differences of a legal character in general.

Hague Convention (No. II) of 1907 respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.—It prohibited, subject to certain exceptions, recourse to force as a legal remedy for enforcing obligations in respect of contracts.

Hague Convention (No. III) of 1907 relative to the Opening of Hostilities.—Article 1 of this Convention provides that the Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

Thirty-one States bound themselves by this Convention.

Hague Convention No IV) of 1907 respecting the Laws and Customs of War on Land.—Under Article I the Contracting Powers undertook to issue instructions to their armed land forces in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention. It was provided in Article 3 that a belligerent party violating the provisions of the said Regulations was liable to pay compensation if the case so demanded. It was made responsible for all acts committed by persons forming part of its armed forces.

Article 22 of the Regulations Respecting the Laws and Customs of War on Land provides that the right of belligerents to adopt means of injuring the enemy is not unlimited.

Under Article 23 it is especially forbidden:

- (a) To employ poison or poisoned weapons;
- (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
- (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
- (d) To declare that no quarter will be given ;
- (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering;
- (f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
- (e) To destroy or seize the enemy's property, unless such distinction or seizure be imperatively demanded by the necessities of war;
- (h) To declare abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible. (Article 24).

The attack or bombardment, by whatever means, of towns, villages, dwellings or buildings, which are undefended is prohibited. (Article 25).

Under Article 29 a person could only be considered a spy when, acting clandestinely or on false pretences, he obtained or endeavoured to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

A spy taken in the act was not to be punished without previous trial. (Article 30).

It was laid down under Article 36 that an armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within fixed radius. (Art. 37).

Any serious violation of the 'armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately. (Art. 40).

Military occupation is dealt with in the Hague Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention (IV) of 1907.

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised. (Art. 42).

A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defence. It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile power. Private property cannot be confiscated. Pillage is formally forbidden. (Arts. 44-47).

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals of which they cannot be regarded as jointly and generally responsible. (Art. 50).

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations. (Art. 53).

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It may use the public lands, buildings, and forests, and may take all the rents and profits arising from them, but may not waste or destory the things themselves. It must safeguard the capital, and administer the properties, in accordance with the rules of usufruct. (Art. 55).

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. (Art. 56).

Hague Convention (No. V) of 1907 respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land .- Article 1 provides that the territory of neutral power is inviolable.

Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral power. They are likewise forbidden to (a) erect on the territory of a Neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea; or (b) use any installation of this kind established by them before the war on the territory of a Neutral Power for purely military purposes, and which has not been opened for the service of public messages. The responsibility of a Neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents. A Neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or in general of anything which can be of use to an army or a fleet. (Arts. 2-8).

A neutral cannot avail himself of his neutrality—(a) if he commits hostile acts against a belligerent, or (b) if he commits acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.

Hague Convention (No. VI) of 1907 relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities .- It was provided that in case an enemy merchant-ship is at the beginning of the war in the port of a belligerent, or, having left its last port of departure before the commencement of the war, enters a belligerent port in ignorance of its outbreak, it is desirable that she should be allowed freely to depart, either immediately or after a reasonable number of days of grace, and, after being furnished with a pass, to proceed direct to her port of destination, or to any other port indicated.

Enemy merchant-ships which left their last port of departure before the outbreak of war, and while still ignorant of the outbreak of war are met at sea by cruisers of the belligerents, may be captured; they may not, however, be confiscated, (Art. 3).

Hague Convention (No. VII) of 1907 relative to the Conversion of Merchant-Ships into Warships .- No converted vessel can have the status of a warship unless she is placed under the direct authority, immediate control, and responsibility of the Power whose flag she flies. A converted vessel must

observe the laws and usages of war.

Hague Convention (No. VIII) of 1907 relating to the Laying of Automatic Submarine Contact Mines .- Article | prohibits belligerents from laying unanchored automatic contact mines unless they are so constructed as to become harmless one hour at most after those who laid them lose control over them. The Convention prohibits belligerents from laying automatic contact mines off the coasts and ports of the enemy with the sole object of intercepting commercial navigation. (Art. 3).

Hague Convention (No. IX) of 1907 respecting Bombardment by Naval Forces in Time of War .- Article 1 provides that the bombardment of undefended ports, towns, villages, dwellings, or other buildings by naval forces is under all circumstances and conditions prohibited. In case of bombardments, all necessary steps must be taken to spare buildings devoted to public worship, art, science, or charitable purposes, hospitals, and places where the sick or wounded are collected, provided they are not at the time used for military purposes. (Art. 6). The giving over to pillage of a town or place, even when taken by assault, is forbidden. (Art. 7).

Hague Convention (No. X) of 1907 for the Adaptation to Maritime Warfare of the Principles of Geneva Convention.—The Convention recognized three kinds of hospital ships, all of which were immune from capture and from the restrictions imposed on warships in neutral ports. They are ships constructed or adapted by States, solely with the view of aiding the wounded, sick and shipwrecked; ships equipped, wholly or in part, at the expense of private individuals, or officially recognized relief societies of belligerent nationality; and ships equipped wholly or in part at the cost of private individuals or officially recognized relief societies of neutral nationality.

Hague Convention (No. XI) of 1907 relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War.—Article 3 of the Convention expressly provides that belligerents must not take advantage of the harmless character of boats engaged in coast fisheries and in local trade. Article 4 granted immunity from attack and seizures to enemy vessels engaged in scientific discovery or to vessels with a religious, scientific or philanthropic mission.

Hague Convention (No. XII) of 1907 relative to the Creation of an International Prize Court.—It provided for the creation of an International Prize Court, to act as a court of appeal from the national tribunals of the belligerent powers. The Convention could not seen to ratification.

Hague Convention (No. XIII) of 1907 concerning the Rights and Duties of Neutral Powers in Naval War.—Article I provides that belligerents are bound to respect the sovereign rights of Neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

A prize court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters. Art. 4.

Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea. (Art. 5).

A prize may only be brought into a neutral port on account of unsea worthiness, stress of weather, or want of fuel or provisions. (Art. 21).

#### APPENDIX C

### LEADING CASES

# JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

# 1. Chung Chi Cheung v. The King

(1939) A. C. 160 AND A. I. R. 1939 P. C. 69

(International Law)

The appellant was a cabin boy on board a Chinese armed public ship. While the vessel was in the Hongkong territorial waters, he shot and killed its captain Douglas Lorne Campbell. He then went up the ladder to the bridge and shot at and wounded the acting chief officer of the ship and then went below and shot and wounded himself. The acting chief officer as soon as he was wounded directed the boatswain to proceed to Hongkong at full speed and hail the police launch. Both the murdered man and the appellant were British nationals in the service of the Chinese Government as members of the officers' crew of the cruiser.

Extradition proceedings instituted by the Chinese authorities failed because of the British nationality of the appellant and also because the murder was committed when the vessel was within the British territorial waters. The appellant was released and was at once rearrested and charged with murder "in the waters of their colony" and duly committed. He was convicted and sentenced to death. The detence argument at the trial that the British Court had no jurisdiction as the murder took place on an armed public vessel of the foreign Government was negatived.

The question that fell for consideration before the Julicial Committee was whether the local British Court had jurisdiction to try the appellant for crimes committed on board public ships of other nations while such ships are in the British territorial waters. The Judicial Committee held that there was no valid ground to oppose the jurisdiction.

Lord Atkin in deliveri g the judgment observed :

On the question of jurisdiction two theories have been propounded. One is that a public ship of a nation is, or, is to be treated by other nations as, part of the territory of the nation to which she belongs. If this theory is accepted there will be no jurisdiction in the Courts of other countries to try offences committed on such ships when in the territorial waters of other countries. The other theory is that a public ship in foreign waters is not, and is not treated as, territory of her own nation. The domestic Court, in accordance with principles of International Law, will accord to the ship and its crew and its contents certain immunities, some of which are well settled, though others are in dispute. The immunities do not depend upon an objective exterritoriality, but on implication of the domestic law. They are conditional, and can in any case be waived by the nation to which the public ship belongs.

Their Lordships entertain no doubt that the latter is the correct conclusion. It more accurately and logically represents the agreements of nations which constitute International Law, and alone is consistent with the paramount necessity, expressed in general terms, for each nation to protect itself from internal disorder by trying and punishing offenders within its boundaries. International Law so far as British Courts are concerned has no validity unless its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon the British code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept among themselves. They will accept these rules as being incorporated into the domestic law, if they are not inconsistent with the statute law of their own country or finally declared by their tribunals.

The true view is that, in accordance with the conventions of International Law, the territorial sovereign grants to foreign sovereigns and their envoys, and public ships and the naval forces carried by such ships, certain immunities. Some are well settled, others are uncertain. When the local court is faced with a case where such immunities come into question, it has to decide whether in the particular case the immunity exists or not. If it is clear that it does, the court will of its own initiative give effect to it. The sovereign himself, his envoy, and his property, including his public armed ships, are not to be subjected to legal process. These immunities are well settled. In relation to the particular subject of the present dispute, the crew of a warship, it is evident that the immunities extend to internal disputes between the crew. Over offences committed on board ship by one member of the crew upon another, the local courts would not exercise jurisdiction.

"Hence where there is a murder of one officer and the attempted murder of another by a member of the crew of a Chinese cruiser in Hongkon: territorial waters, the Chinese Government has jurisdiction over the offence; and though the offender had for reasons of humanity been taken to a local hospital, a diplomatic request for his surrender would be in order. The fact that either the victim or the offender or both are local nationals would not make a difference if both are members of the crew. But, if this request was never made and the only request for extradition failed, the Chines Government can be taken to have consented to the British Court exercising jurisdiction and the British Court at Hongkong has jurisdiction to try the offence."

There was, accordingly, no valid objection to the jurisdiction, and the appeal failed.

2. The Paquete Habana

(1899) 175 U.S. 677

(Isages and Customs of Civilized Nations)

The Paquete Habana, a fishing boat, and another fishing boat, Lola, flying the Spanish flag and belonging to a Spanish subject, were captured by a United States warship engaged in the blockade of the north coast of Cuba.

They were brought before the Court for condemnation. The question that fell for consideration was whether under customary International Law fishing boats were exempt from capture. The Supreme Court while reversing the order of the lower court held that they were free from capture.

In the course of the judgment, Gray J., observed that for ascertaining International Law, in the absence of treaty or any controlling executive act or judicial decision, resort must be had to the customs and usages of civilized nations and, as evidence of these, to works of jurists and commentators who by years of labour, research and experience have made themselves peculiarly acquainted with the subjects they treat. Such works are resorted to by judicial tribunals, not for the speculation of their authors concerning what the law ought to be but for the trustworthy evidence of what law really is.

### KING'S BENCH DIVISION

## West Rand Central Gold Mining Co. Ltd. v. The King: (1905) 2 K. B. 391

(International Law and Municipal Law and State Succession

The company was an English company working a gold mine in the Transvaal. Two parcels of gold belonging to the company were seized by officials of the former South African Republic in accordance with the instructions of the Republican Government. Subsequently as a result of the Boer War, which commenced on October 11, 1889, the South African Republic was conquered and annexed to the British Empire. The company thereupon sought to recover the gold or its value from the British Government on the ground that by the conquest and annexation of the South African Republic, the British Government succeeded to all the rights and duties and obligations of the former Republican Government.

Lord Alverstone, C. J., observed that upon principle the proposition that by International Law the conquering country was bound to fulfil the obligations of the conquered could not be sustained. If by public proclamation or by convention the conquering country promised something that was inconsistent with the repudiation of particular liabilities, good fait h would prevent repudiation.

As regards the relation of International Law with the Municipal Law of England, the learned Chief Justice observed that it was true that whatever had received the common consent of civilized nations must have received the assent of their country, and that to which they had assented along with other nations in general might properly be called International Law, and as such would be acknowledged and applied by their municipal tribunals when legitimate occasion arose for those tribunals to decide questions to which doctrines of International Law might be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the International Law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward had been recognized and acted upon by their own country, or that it was of such a nature, and had been so widely and generally accepted that it could hardly be supposed that any civilised State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, were not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of International Law by their frequent practical recognition in. dealings between various nations. International Law, according to the learned Chief Justice, who adopted the language, used by Lord Russell of Killowen, in his address at Saratoga in 1896 on the subject of International Law and Arbitration, could, therefore, be defined as the sum of the rules or usages which civilised States have agreed shall be binding upon them in their dealings with one another.

The claim of the company to recover from the British Government the gold or its value was, there fore, disallowed.

# MIXED CLAIMS COMMISSION UNITED STATES AND GERMANY

# 4. THE LUSITANIA

(1923' Decisions, Mixed Claims Commission, United States and Germany, 1925, p. 17

# (International Torts)

During the first world war, on May 7, 1915, the Lusitania, a British liner was sailing from New York to England with nearly 2000 passengers, most of whom were Americans. She was torpedoed by a German U-boat without warning off the coast of Ireland. She immediately sank and about 1200 persons lost their lives. The American Government lodged a strong protest at the sinking of the Lusitania. The German Government, however, contended that she was not an ordinary unarmed merchant vessel but was in the class of an auxiliary cruiser and was included in the navy-list published by the British Admiralty; that the vessel was armed; that the general practice of the British Government in arming merchant ships with instructions to attack the enemy made it impossible to spare them from attack and that the unlawful blockade of Germany by England made it necessary for Germany to resort to reprisals. The American Government, however, contended that the action of Germany in torpedoing a ship with a large number of neutral civilians amounted to the violation of the sacred right of neutrality. In May 1916 the German Government after a long exchange of notes agreed not to sink merchant vessels without warning and without saving human lives unless those ships attempted to escape or offered resistance. This undertaking was, however, not honoured by Germany when on January 31, 1917, she announced that the brutal methods of war adopted by England and the Allies gave freedom of action to Germany and that henceforward all vessels within the prescribed zone would be sunk by Germany.

As a result of the Treaty of Berlin, 1921, terminating the war between Germany and the United States a Mixed Claims Commission was created in 1922 to consider claims arising from the loss of the Lusitania.

The Commission found that Germany was financially obligated to pay to the United States all losses suffered by American nationals as a result of the sinking of the Lusitania. The Commission directed that compensation must be full, adequate and complete, although there was no place for any vindictive or punitive provisions.

### HOUSE OF LORDS

# 5. THE CRISTINA

(1931) A. C. 485

International Law and Municipal Law and Recognition)

During the Spanish Civil War (1936-1939) on the 19th June, 1937, General Franco captured from the Republican Government of Spain the port of Bilbao. The Cristina was a Spanish vessel registered at Bilbao. The Republican Government, however, issued a decree on the 28th June, 1937, requisitioning all ships registered at Bilbao. When the Cristina arrived in a British port she was taken in charge by the Spanish consul. The appellants—the original owners of the vessel—raised an action by a writ in rem and claimed possession of the vessel as sole owners. The Spanish Government entered a conditional appearance and contended that the action be dismissed as it impleaded a foreign sovereign State.

Lord Wright, with whom three other Lords agreed, observed that the general principles of International Law envisaged that the sovereign State is held to be immune from the jurisdiction of another sovereign State. This is sometimes said to flow from international comity or courtesy, but may now more properly be regarded as a rule of International Law, accepted among the community of nations. It is binding on the municipal courts of this country in the sense and to the extent that it has been received and enforced by these Courts. It is true that it involves a subtraction from the sovereignty of the State, which renounces pro tanto the competence of its Courts to exercise "their jurisdiction even over matters occurring within its territorial limits, though to do so is prima facie an integral part of sovereignty. The rule may be said to be based on the principle that no State can claim jurisdiction over another sovereign State. Or it may be rested on the circumstance that in general the judgment of a municipal court could not be enforced against a foreign State, or that the attempt to enforce might be regarded as an unfriendly act. Or it may be taken to flow from reciprocity, each sovereign State within the community of nations accepting some subtraction from its full sovereignty in return for similar concessions on the side of the others. The rule is naturally subject to waiver by the consent of the sovereign, who may desire a legal adjudication as to his rights.

It was accordingly held that as a sovereign State the Spanish Republican Government could not be impleaded unless it consented. It was further observed that the circumstances under which the respondent took possession of the Cristina sufficiently Lrought the vessel within the description of public property of the State destined to public use.

#### PRIVY COUNCIL

### 6. Civil Air Transport Incorporated

27

## Central Air Transport Corporation

[(1952) (The All England Law Reports, Vol. 2, 733)]
(Recognition)

The appellant Civil Air Transport Incorporated was a corporation formed under the laws of the State of Delaware, U. S. A., while the Central Air Transport Corporation hereinafter called C. A. T. C.) was an unincorporated

State-owned enterprise of the Government of the Republic of China. The C. A. T. C. was administered by a board of governors under ministerial directions, its assets including aircraft operating to and from Hong Kong.

In April, 1949, the National Government of the Republic of China (hereinafter called the "nationalist government") was forced by communist state of the forces in China to move its headquarter from Nanking.

In September, 1949, 49 aircraft belonging to the nationalist government, and forming part of the fleet of civil aircraft operated by C. A. T. C. were lying on an airfield in Hong Kong.

On October 1, 1949, the Central People's Government of China (referred to hereafter as "communist government") proclaimed itself to be the Government of China and purported to dismiss the Ministers of the nationalist government.

On November 9, 1949, the president of C. A. T. C. flew from Hong Kong to Peking and transferred his allegiance in the de facto communist government. The majority of the employees of C. A. T. C. also deflected to the communist government. On November 12, 1949, the communist government declared C. A. T. C. to be their property.

On December 9, most of the mainland of China being under the control of the communist forces, the nationalist government moved its headquarters to Formosa.

On December 12, 1949, the nationalist government sold the assets of C. A. T. C. to an American partnership. Seven days later, in accordance with another term of the agreement, the assets including the 40 aeroplanes, were transferred to the appellant company, and the aircraft were registered by the company in the U. S. A.

As from midnight of January 5/6, 1950, the Government of the United Kingdom ceased to recognise the nationalist government and recognised the communist government as de jure government of China.

On January 13, 1950, the communist government ordered the general manager of C. A. T. C. to take over all assets of C. A. T. C. in Hong Kong. The appellant company sought a declaration from the Supreme Court of Hong Kong that the forty aircraft on the airfield in Hong Kong were its property; but its claim was dismissed. An appeal was preferred to the Privy Council, which was allowed by their Lordships of the Judicial Committee.

Viscount Simon while delivering the judgment of the Board observed: "Her Majesty's Government in the United Kingdom is the sovereign government of Hong Kong and the effect of the replies obtained from the Foreign Office in London by the Hong Kong Court is to establish that, at any rate in the courts of Hong Kong and in the present appeal, the former nationalist government must be regarded as the sole de jure sovereign government of China up to midnight of January 5/6, 1950, that the present communist government was not the de jure government until that time, and that, while the Foreign Office, in its answer on March 13, 1950, acknowledged that from October 1, 1949, onwards the de facto government of those parts of China in which the nationalist government had ceased to be in effective control was the communist government, His Majesty's Government had not announced or communicated its recognition of the communist government as the de facto government over any part of China before it recognised the communist government as the de jure government of China on January 5/6. 1950."

It was urged on behalf of the appellants before the trial judge that C. A. T. C. was wholly owned and controlled by the nationalist government and there was a valid sale on December 12, 1949, by that government to the partnership; that the partnership duly transferred the assets by a sale valid in American law to the appellant and that a change of government is by succession and not by title paramount, and, accordingly, the nationalist government was empowered to enter into this transaction, being still recognised as the de jure government by His Majesty's government, and the doctrine of retroactivity did not apply. The trial judge rejected these arguments on two grounds.

The first ground was that the situation of the nationalist government on December 12, 1949, was such that it could not validly enter into such a sale. Dealing with this ground Viscount Simon observed that the validity of the transaction must be judged as at the date when it was entered into, and not in the light of subsequent events, which might have turned out differently. On December 12, 1949, the nationalist government was the de jure government of China, of which C. A. T. C. was an organ, and, therefore, the property in these aeroplanes was in the nationalist government.

The second ground on which the decision appealed against was based in the Hong Kong Courts (Gould J., dissenting) depends on the alleged retroactive effect of the recognition by His Majesty's Government in the United Kingdom of the communist government as the de jure Government of China as from January, 5/6, 1950.

Their Lordships agreed with the conclusion of Gould J. in the dissenting judgment of the Full Court in Hong Kong that "the question must be settled with reference to the right to possession...My opinion, therefore, upon this aspect of the case is that the Central People's Government could not show any superior title or right to possession; nor can it rely upon any rights arising out of the actual possession acquired in the way it was; therefore, it had no possession which could bring into effect the doctrine of retroactivity. That doctrine, I think, relates to the acts of a government which has already acquired jurisdiction through possession and cannot include the actual act of taking possession if that act be wrongful. On this point I hold, therefore, that the ordinary principle of continuity was not displaced by any consideration of retroactivity and that it follows that the nationalist government was entitled to possession of and had jurisdiction over the aeroplanes.

In the result, it was held that the title conferred by the contract of December 12, 1949, was not extinguished and the appellant company was entitled to the declaration which it sought. The appeal was accordingly allowed.

#### HOUSE OF LORDS

#### 7. The Arantzazu Mendi

[ (1939) P. 37: 2 B. I. L. C. 188]

(Recognition and Territorial Jurisdiction)

The Port was captured by the insurgent forces led by General Franco in June 1937. She arrived in London in August 1937. In pursuance of a decree dated June 28, 1937, the Spanish ship Arantzazu Mendi registered at Bilbao, after that

port had been captured by General Franco's forces, was requisitioned by the Republican Government. The vessel was not then in Spanish territorial waters. On her arrival in the Thames her owners issued a writ in rem for possession; she was arrested by the Admiralty marshal and at all material times remained under arrest. On April 5, 1938, she was requisitioned by the Nationalist Government and the managing director of the owners and the master of the ship made a declaration that they held the vessel at the disposal of the Nationalist Government. Thereupon, the Republican Government issued a writ in rem on April 13, 1938, claiming possession of the vessel and served a warrant of arrest on her. The Nationalist Government entered an appearance under protest and moved to set aside the writ and arrest on the ground that the action impleaded a foreign sovereign State, namely the Nationalist Government of Spain, which was unwilling to submit to the jurisdiction of the English Courts.

The question that fell for consideration was whether the ship belonged to the de jure Republican Government of Spain or the de facto Franco Government, which had control over the port of Bilbao. where the ship was registered.

The first court inquired of the Foreign Office whether His Majesty's Government recognized the Nationalist Government of General Franco as a foreign sovereign State and the reply was that they recognized the Nationalist Government as a government which at present exercised de facto administrative control over the larger portion of Spain and that the Nationalist Government was not a Government subordinate to any other Government in Spain.

The first court accordingly held that the Nationalist Government was a foreign sovereign State and set aside the writ and the warrant of arrest on the ship.

The decision of the Court of Appeal upholding this unding was affirmed by the House of Lords.

Lord Atkin in the House of Lords observed as follows:

"The letter from the Foreign Office appears to me to dispose of the controversy. By exercising de facto administrative control, or exercising effective administrative control, I understand exercising all the functions of a sovereign government in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the Government. It necessarily implies the ownership and control of property whether for military or civil purposes, including vessels whether warships or increhant ships. In those circumstances it seems to me that the recognition of a Government as possessing all those attributes in a territory while not subordinate to any other Government in that territory is to recognize it as sovereign, and for the purposes of the International Law as a foreign sovereign, State".

#### ADMIRALTY PRIZE COURT

#### 8. The Ionian Ships

(1855) [2 Spinks, 212: Hudson Cases 421]

The Treaty of Paris (1815) declared the Ionian islands as a free and independent State under the exclusive protection of Great Britain. In 1854, during the Crimean War between Great Britain and Russia, some ships flying the Ionian State flag were captured in the Black Sea by British cruisers and were brought in for adjudication on the ground that the Ionians being British subjects were trading with the enemy. Great Britain had not declared war against Russia on behalf of the Ionian islands, and the question, therefore, which fell for consideration was as to whether the Ionian Islands constituted an independent State and whether the inhabitants of the Ionian Islands were to be considered as British subjects and the enemies of Russia.

The Court held that the war between Russia and Great Britain did not involve Ionian Islands in a state of war against Russia and consequently the trade was not illegal.

[Comments: This case is an authority for the proposition that a community although under the protection of another State and not possessing complete external or internal independence may nevertheless be treated as a separate political body. This conclusion was arrived at on an examination of the actual relations subsisting between the protecting State and the protected community. It was found that in spite of large powers being vested in the protecting State including the power to conclude treaty, the community was nevertheless intended to be treated as a separate political body. It was recognised as a separate international person and possessing an independent flag.]

#### 9. The Charkieh

(1873) L. F. 4 A. & E., 59

(International Persons)

The Charkieh was a ship belonging to the Khedive of Egypt. She was arrested for having run down a vessel, S. S. Batavier, in the Thames on the 19th of October, 1872. The owners of the S. S. Batavier raised an action in rem and claimed damages against the S. S. Charkieh sustained by them by reason of the collision.

A petition was thereupon made to restrain further proceedings against the S. S. Charkieh on the ground that the ship was the property of the Khedive of Egypt, who was an independent sovereign and consequently not amenable to the jurisdiction of the English Court of Admiralcy. The ship at the time of the collision was flying the flag of the Ottoman navy.

The Court after reviewing the international position of Egypt held that the Khedive was not at that time to all intents and purposes an independent sovereign and as such his property was not exempt from the local courts.

#### (HOUSE OF LORDS)

10. Duff Development Co., Ltd

Appellants

and

Government of Kelantan and Another ...

Respondents

(1924) A. C. 797

(Jurisdiction and Recognition)

On July, 15, 1912, the respondents, the Government of Kelantan (acting by the Crown Agents for the Colonies), entered into an agreement under seal

with the arguments, the Duff Development Co., Ltd, whereby the Government of Kelantan granted to the company certain rights of mining, timber cutting, etc., to be exercised in the State. The deed contained an arbitration clause. Disputes having arisen as to the meaning and effect of the deed, they were referred in accordance with the provisions of the arbitration clause to an arbitrator, who, by his award dated November 17, 1921, made certain declarations in favour of the company. The Government moved the Chancery Division of the High Court of Justice in England to set aside the award on the ground of error in law appearing on the face of it. The application was dismissed and that decision was affirmed by the Court of Appeal and by the House of Lords. The company subsequently applied to the King's Bench Division of the High Court for leave to enforce the award, and an order to that effect was made. Subsequently a garnishee order was made whereby certain moneys said to be owing to the Government of Kelantan from the Crown Agents for the Colonies were attached for payment of the taxed costs of the arbitration.

Viscount Cave observed in the House of Lords :

In the present case the reply of the Secretary of State shows clearly that notwithstanding the engagements entered into by the Sultan of Kelantan with the British Government that Government continues to recognise the Sultan as a sovereign and independent ruler... If after this definite statement a different view were taken by a British Court, an undesirable conflict might arise; and, in my opinion, it is the duty of the Court to accept the statement of the Secretary of State thus clearly and positively made as conclusive upon the point.

As regards the plea based on waiver of sovereignty and submission to the jurisdiction of the Court reference was made to Mighell v. Sultan of Johore (1894) (1 Q.B. 149, where it was held that a submission by a foreign sovereign, to be effective, must take place when the jurisdiction is invoked and not earlier, and that when a question of jurisdiction is raised by him there can be no inquiry by the Court into his conduct or actions prior to that date; and his Lordship saw no reason for doubting the correctness of that decision. If, therefore, a sovereign having agreed to submit to jurisdiction refuses to do so when the question arises, he may indeed be guilty of a breach of his agreement, but he does not thereby give actual jurisdiction to the Court.

.....I am of opinion that this appeal fails and should as against the respondent Government be dismissed with costs.

#### COURT OF APPEAL

#### 11. Haile Selassie v. Cable and Wireless Ltd. No. 2)

(1939) Ch. 182

(State Succession)

Haile Selassie was the Emperor of Ethiopia, living in exile in England. The defendant Cable and Wireless Ltd., had entered into a contract in 1935 with the Director-General of Posts, Telegraphs and Telephones of Ethiopia. In consequence of the contract a sum of money became due from the Cable and Wireless Ltd., to the public revenues of Ethiopia. The Emperor of Ethiopia filed a suit in England for an account to be taken of the money due to him under the contract and for payment of the same after accounting.

In the meantime Ethiopia had been overrun by Italy and the company, although admitting the amount due from them, urged that the amount due was now payable to the Italian Government as they had received a letter from Italian Ambassador in London.

The Court of Appeal observed that since His Majesty's Government no longer recognized Haile Sclassie as de jure Emperor of Ethiopia and recognized the King of Italy as de jure Emperor of Ethiopia, the King of Italy as Emperor of Abyssinia was entitled by succession to the public property of the State of Abyssinia, and the late Emperor of Abyssinia's title thereto was no longer recognized as existent. The right of succession was to be dated back at any rate to the date when the de facto recognition of the King of Italy as the de facto sovereign of Abyssinia took place, which was in December 1936. In the result, the appeal was allowed and the action dismissed.

#### 12. The United States of America v. McRae

(1869) L. R. 8 EQ. 69

(Succession to Public Property of the State on Rebellion)

The defendant McRae had been employed as an agent for purchase of war materials by the "Government of the Confederate States of America" which had been formed by diverse persons who were inhabitants of the United States of America and had risen in rebellion against the Government of U. S. A. In this capacity he received a considerable sum of money from the Confederate Government. The United States Government after the defeat of the Southern Confederacy brought an action against McRae for the purpose of obtaining an account of all moneys and goods which came to the defendant, as agent, or otherwise, on behalf of the pretended Confederate Government during the late resurrection. The defendant pleaded that by an Act of Congress of the plaintiffs, the property of all persons holding any office or agency under the Government of the Confederate States was liable to confiscation and that the plaintiffs could not have relief without waiving the right to confiscate.

The defendant put in no answer, and simply left the plaintiffs to make out their own title to relief.

James, V. C. asked if the plaintiffs were willing to have the account taken, as it would be taken, between the Confederate Government on the one hand and the defendant, as agent of such government, on the other hand; and to pay what (if anything) might be found due from them on the footing of such account. The plaintiffs, however, declined to accept the decree in any form which would recognise the authority of the belligerent States or involve any privity with their agent. In this view, the suit was dismissed with costs.

The Court observed that upon the suppression of a rebellion, the restored legitimate government is entitled, as of right, to all moneys, goods and treasure which were, at the outbreak, the public property of the government, such right being in nowise divested or defeated by the wrongful seizure of them. But with respect to property which has been voluntarily contributed to, or acquired by, the insurrectionary government in the exercise of its usurped authority, it was clear public universal law that any government which de facto succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to

everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever may be the nature or origin of the title of such displaced power. Any such public property would, on the success of the new or restored power, vest ipso facto in such power; and it would have the right to call to account any agent, debtor, or accountant to or of the persons who had exercised and had ceased to exercise the authority of a government. But this right is the right of succession, is the right of suppressed and displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights as if that authority had not been suppressed and displaced and was itself seeking to enforce it.

#### 13. Bank of China

v.

#### Wells Fargo Bank & Union Trust Company

United States District Court [(1952) 104 F. Supp. 597

(Succession to rights and obligations)

In this case the question that fell for consideration was which Bank of China, the one controlled by the Nationalist Government of China or the other controlled by the People's Government of China, was legally entitled to the funds deposited with the defendant Bank. The controlling corporate authority of the Bank of China being effectively vested in the Government of China by virtue of its majority stock ownership, the issue that focussed attention at the outset was which of the two governments, one recognized by the United States while the other not, was to be recognized by the United States courts. The Court observed that, fron a practical standpoint, neither of the rival Banks of China is a true embodiment of the corporate entity which made the deposit in the Wells Fargo Bank. The present Nationalist Bank of China is more nearly equivalent in the sense of continuity of management. The Peoples Bank is more representative in ability to deal with the greater number of private stockholders and established depositors and creditors. Were the Court to adopt a strictly pragmatic approach, it might attempt a division of the deposit between these two banks in the degree that each now exercises the functions of the Bank of China. Or the Court might award the entire deposit to the bank it deems to be the closest counterpart of the corporation contemplated by the Articles of Association. But this, the Court could not do merely by balancing interests of a private nature. Such a course would ultimately entail determining which hank best serves the corporate interests of the State of China. That determination could not be made, while the State itself, ren ain divided except by an excursion into the realm of political places by. Were there only one government, in fact, of the Chinese State, or only one government in a position to act effectively for the State in respect to the matter before the Court, the Court might be justified in accepting such a government as the proper representative of the State, even though our executive declined to deal with it. Here, there co-exist two governments, in fact, each attempting to further, in its own way, the interests of the State of China, in the Bank of China. It is not a proper function of a domestic court of the United States to attempt to judge which government best represents the interests of the Chinese State in the Bank of China. In this situation, the Court should justly accept, as the representative of the Chinese State, that government which our

executive deems best able to further the mutual interests of China and the United States. The Court accordingly ruled that it should recognize the Nationalist Government of China as legally entitled to exercise the controlling authority of the Bank of China in respect to the deposit in suit.

#### 14. The City of Berne in Switzerland

v.

#### The Bank of England

[(1804) 9 Ves. Jun. 347] Feb. 29, 1804

Judicial notice of a foreign Government not recognised by the government of the country)

The plaintiff, the City of Berne in Switzerland, moved that the Governor and Company of the Bank of England be restrained from permitting a transfer of, and the trustees from transferring, certain funds, standing in their names under a purchase by the old Government of Berne before the Revolution. The Bank of England and the trustees opposed the motion on the ground that the existing Government of Switzerland not being acknowledged by the government of England, could not be noticed by the Court.

The Lord Chancellor did not make the order and observed that he was much struck with the objection; and it was extremely difficult to say, a judicial court can take notice of government, never authorised by the government of the country, in which that court sits; and, whether the foreign government is recognized, or not, is a matter of public notoriety.

#### [PRIVY COUNCIL]

15. Cook and another

Plaintiffs

and

Sir James Gordon Sprigg

Defendant.

[On Appeal From the Supreme Court of the Colony of the Cape of Good Hope]

Law Reports (1899) A. C. 572

Legal Effects of Conquest-Property and Obligations

The appellants claimed in their action certain railway, mineral, township, land, trading and other rights in Eastern Pondoland granted to them by Sigcau, paramount chief of Pondoland, by virtue of certain concessions. The respondents admitting the execution by Sigcau of the said concessions alleged that at the date of the same the British Government was the sole paramount authority in Pondoland, and that without the consent of the said Government—which consent was not given—the said concessions were of no legal force or effect.

The Lord Chancellor in delivering the judgment observed that it appeared to be established by proof that the appellants never in fact obtained possession of the lands or exercised the rights which these documents purported to convey. It was held that the appellants as grantees of concessions made by the paramount chief of Pondoland could not, after the annexation of Pondoland by Her Majesty, enforce against the Crown the privileges and rights conferred.

The taking of possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State and any obligation assumed under a treaty to that effect, either to the ceding sovereign or to individuals, is not one which municipal courts are authorised to enforce.

The Lord Chancellor quoted with approval the observations by Lord Kingsdown in the case of Secretary of State for India in Council v. Kamachee Boye Sabha (13 Moo. P. C. 22, 86):

".......It is sufficient to say that, even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy."

At the same time, their Lordships were by no means prepared to differ from the observations of the Chief Justice that the appellants had strong claims to the favourable consideration of the Government and Parliament of the country.

Appeal dismissed

#### 16. Case of the Danish Fleet

(Self-Preservation)

#### 17 Case of Amelia Island

(Self-Preservation)

[For a discussion of these cases please refer to Chapter XIII on Doctrine of Necessity and Self-Preservation at page 161.]

#### COURT OF APPEAL

### 18. The Parlement Belge

(1880) 5 P. D. 197

(Territorial Jurisdiction: Immunities and Limitations)

The Parlement Belge was a Belgian mail packet, which was also used for trading purposes. She collided against a vessel, the "Daring" owned by the Britishers, in the Dover Harbour. Proceedings were commenced by the English owners of the "Daring" in the Admiralty Division to recover redress against the Parlement Belge.

It was observed by the Court of Appeal that a publicly-owned vessel of the State of Belgium, used as a mail-packet as well as for general commercial purposes, was exempt from a suit in rem for damages arising out of a collision. The Court observed that even though an action in rem were an action against

the property only, a suit could not be brought. In the result, the Court held that it would not exercise jurisdiction over the person or public property of a foreign sovereign, and that it could not even inquire into the declaration of the foreign sovereign as to the nature of the ship.

# 19. The Case of Adolf Eichmann: The Attorney-General of the Government of Israel

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#### Eichmann

[District Court of Jerusalem, Judgment of Dec. 11, 1961]

[Jurisdiction]

Adolf Eichmann was abducted from Argentina and brought to trial in Israel under the Nazi Collaborators (Punishment) Law, enacted after Israel became a State and after the events charged against Eichmann during the Nazi era in Germany.

Learned counsel for Eichmann did not ignore the fact that the Israel law applicable to the acts attributed to the accused vests in the Court the jurisdiction to try this case. His contention against the jurisdiction of the Court was not based on that law, but on international law. He contended that the Israel law, by inflicting punishment for acts done outside the boundaries of the State and before its establishment, against persons who were not Israel citizens, and by a person who acted in the course of duty on behalf of a foreign country (act of State) conflicts with international law and exceeds the powers of the Israel legislator; and that the prosecution of the accused in Israel upon his abduction from a foreign country conflicts with international law and exceeds the jurisdiction of the Court............

The first contention of counsel that Israel law is in conflict with international law and that therefore it cannot vest jurisdiction in this Court, raises the preliminary question as to the validity of international law in Israel and as to whether in the event of a clash between it and the laws of the land, it is to be preferred to the laws of the land.

The Court observed: "Our jurisdiction to try this case is based on the Nazis and Nazi Collaborators (Punishment) Law, a statutory law the provisions of which are unequivocal. The Court has to give effect to the law of the Knesset, and we cannot entertain the contention in that this law conflicts with the principles of International Law. For this reason alone counsel's first contention must be rejected."

But the crimes dealt with in this case are not crimes under Israel law alone, but are in essence offences against the law of nations. It is hardly necessary to add that the "crime against the Jewish people," which constitutes the crime of "genocide" is nothing but the gravest type of "crime against humanity" (and all the more so because both under Israel law and under the convention a special intention is requisite for its commission, an intention that is not required for the commission of a "crime against humanity". Therefore, all that has been said in the Nuremberg principles on the 'crime against humanity' applies a fortiori to the 'crime against the Jewish people.'

83

The theory of "act of State" was repudiated by the International Military Tribunal at Nuremberg......The contention of learned counsel that it is not the accused but the State in whose behalf he had acted, that is responsible for his criminal acts is only true in its second part. It is true that under international law Germany bears not only moral, but also legal, responsibility for all the c imes that were committed as its own "Acts of State," including the crimes attributed to the accused. But that responsibility does not detract one lota from the personal responsibility of the accused for his acts.....

For the above reasons the Court dismissed the contention as to 'act of State.'

Learned counsel summed up his pleadings against the jurisdiction of the Israel legislator by stressing that under International Law there must be a connection between the State and the person who committed the crime, and that in the absence of an "acknowledged linking point" it was ultra vires the State to inflict punishment for foreign offences.

In the light of the recognition by the United Nations of the right of the Jewish people to establish their State, and in the light of the recognition of the established Jewish State by the family of nations, the connection between the Jewish people and the State of Israel constitutes an integral part of the law of nations.

The second contention of learned counsel was that the trial in Israel of the accused following upon his capture in a foreign land is in conflict with international law, and takes away the jurisdiction of the Court.

The Court observed that through the joint decision of the Governments of Argentina and Israel of 3-8-60 "to view as settled the incident which was caused through the action of citizens of Israel that has violated the basic rights of the State of Argentina" the country the sovereignty of which was violated, has waived its claims, including the claim for the return of the accused, and any violation of International Law which might have been linked with the incident in question has been "cured".....

On the solid ground of municipal law the accused can have no argument against the jurisdiction of the Court, while his contention based on the "voilation of International Law" is untenable because such ground did not exis, at all events at the time of his prosecution.

The accused is not a "political" criminal and Argentina has given him on right of "refuge" in her territory, and all that has been said in our precedents on the subject of the want of the right of refuge of a "political" criminal applies to the accused a fortiori.

To sum up, the contention of the accused against the jurisdiction of the Court by reason of his abduction from Argentina is in essence nothing but a plea for immunity by a fugitive offender on the strength of the refuge given him by a sovereign State. That contention does not avail the accused for two reasons: (a) According to the established rule of law there is no immunity for a fugitive offender save in the one and only case where he has been extradited by the country of asylum to the country applying for extradition by reason of a specific offence, which is not the offence tried in his case. The accused was not surrendered to Israel by Argentina and the State of Israel is not bound by a agreement with Argentina to try the accused for any other

specific offence, or not to try him for the offence with which the Court is concerned in this case. (b) The rights of asylum and immunity belong to the country of asylum and not to the offender, and the accused cannot compel a foreign sovereign country to give him protection against its will. The accused was a wanted war criminal when he escaped to Argentina by concealing his true identity. It was only after he was captured and brought to Israel that his identity has been revealed, and after negotiations between the two Governments, the Government of Argentina waived its demand for his return and declared that it viewed the incident as settled. The Government of Argentina thereby retused definitely to give the accused any sort of protection. The accused has been brought to trial before a Court of a State which accuses him of grave offences against its laws. The accused has no immunity against this trial, and must stand his trial in accordance with the Charge Sheet.

For all the above-mentioned reasons the Court dismissed the contention of counsel and his prayer to hear witnesses on this point.......

# 20. Mighell v. Sultan of Johore

(1894 I Q. B. 149

(Territorial Jurisdiction . Immunities and Limitations)

The Sultan of Johore while staying in Great Britain introduced himself by the assumed name of "Albert Baker". He promised to marry the plaintiff, who was a lady. He did not carry out his promise and accordingly the lady sued him for breach of promise. It was contended on his behalf that the Court had no jurisdiction as he was a sovereign independent ruler and he had not submitted to the jurisdiction of the Court. Both the Court of first instance and the Court of Appeal upheld the contention of the Sultan of Johore and dismissed that of the lady.

Quoting his observations from the case of the Parlement Belge (1880) 5 P.D., 197, 2.4, Lord Esher, M. R. observed that the principle is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.

#### HOUSE OF LORDS

House offords

#### 21. Amand v. Secretary of State for Home Affairs and another

(1943) A. C. 149

(Territorial Jurisdiction)

The appellant was a Dutch subject who had been living in England for Hyears By adecree dated August 8, 1940 the Queen of the Netherlands

ordered certain classes of Dutch subjects resident in Great Britain to register for military service with the Netherland forces. In August, 1940, in compliance with notices ordering him to report for duty as a conscript, he joined the Netherlands army in England under protest. In February 1941 he took a week's leave after about five months' service, but did not return at its expiration. He was subsequently arrested and detained at a police station, but was released on bail when he moved a writ of habeas corpus, contending that he was not amenable to Dutch military law. The Divisional Court, the Court of Appeal and the House of Lords dismissed his application for writ.

It was observed by Viscount Simon L. C. that the unit in which the appellant had been serving was an allied force and the required formalities had been satisfied. The appellant was guilty of desertion and absence without leave which are offences under military law. The Lord Chancellor observed that no appeal lay against the dismissal of an application for a writ of habeas corpus in a criminal cause and the appellant's application for the writ and the decision of the Divisional Court refusing it were made in a criminal cause or matter.

#### 22. Republic Arabe Unie c. Dame X

(Switzerland, Supreme Court, February 10, 1960)
(Immunity of Foreign States from Jurisdiction, and Distinction between Acts of State and P-ivate Transactions)

In 1951, the defendant X, a resident of Switzerland, leased her villa in Vienna, Austria, to the Egyptian Minister to Austria, the house to be used for diplomatic purposes and as a residence for the minister. It was provided in the contract of lease that the rent was required to be paid at a Swiss bank, and any dispute arising from the lease was to be decided by the civil court of 7 prich.

The defendant terminated the lease in 1957 on the ground that the tenant had not complied with his obligations and claimed a certain amount for which she obtained an attachment in Geneva of funds of the Republic of Egypt located in a Geneva bank. Attempt was made to effect service of the attachment order on the Egyptian Foreign Office, but the Foreign Office refused to accept it on the ground that the attachment and execution violated immunity of the Egyptian Sta e. In May 1959, the Swiss Embassy in Cairo executed a certificate to the effect that it had attempted service, and on that b sis the attachment of 1957 was converted into a definite seizure.

The villa was ultimately evacuated by the Minister in Vienna of the United Arab Republic in 1959, and the owner after a survey of the building increased her claim against her former tenant by an additional amount and obtained an additional attachment. Service was again attempted but the Government of the United Arab Republic refused acceptance.

The funds attached belonged to the United Arab Republic, being the security which Egypt had deposited in connection with contracts for the purchase of war materials.

The United Arab Republic sued in the Supreme Court of Switzerland for the setting aside of the two attachments and seizures, on the grounds of non-service with proper notice and violation of the immunity of foreign States from local jurisdiction and execution. While dismissing the complaint the

Court observed that according to the established jurisprudence of the Supreme Court, the rule of immunity from suit is not an absolute rule of general scope. A distinction must be made according to whether the foreign State acts by virtue of its sovereignty ( jure imperii) or as a party under private law ( jure gestionis). Immunity from suit can be claimed only in the former case. In the latter case, the foreign State can be sued in the Swiss courts and be subjected to measures of execution, provided that the legal relation involved has a territorial connection with Switzerland, i.e., that it came into being there or is to be performed there or that at least the debtor accomplished certain acts which created a place of performance in Switzerland. The transaction in the particular case had all the characteristics of an agreement between private parties. The obligations of both parties resulted from private law, and the parties understood that so well that they agreed to subject their disputes to an ordinary civil court. When signing the lease the Kingdom of Egypt through the Egyptian Minister to Austria acted like any private individual renting real estate. The rent was to be paid at a bank in Switzerland and the jurisdiction of a Swiss court was stipulated by the parties. The plaintiff therefore could not invoke its immunity from suit in Switzerland. The plaintiff also could not claim immunity from execution as the power of execution flew from the power of jurisdiction.

The complaint as indicated above was dismissed.

#### 23. The Creole

[Moore's International Arbitrations, IV, 4375]
( Jurisdiction)

[For a discussion of this case please refer to Chapter XVII on "Jurisdiction" at page 222.]

#### 24. Hirota v. McArthur (1948) 335 U. S. 876

(Jurisdiction over Military Tribunals

The judgment of the Tokyo Tribunal was delivered in November 1948 and some of the convicted persons filed petitions for habeas corpus with a view to testing the legality of the entire proceedings of the Tribunal. The Supreme Court held that the Tribunal sentencing these petitioners was not a tribunal of the United States. The military tribunal sentencing the petitioners had been set up by General Mc Arthur as the agent of the Allied Powers. Under the circumstances the courts of the United States had no power or authority to review, set aside or annul the judgments and sentences imposed on these petitioners.

#### 25. Case Concerning the Rights of Nationals of the United States of America in Morocco

(Jurisdiction)

[For a discussion of this case please see Chapter XXXIX "International Court of Justice" at page 481.]

# PERMANENT COURT OF INTERNATIONAL JUSTICE

26. The S. S. Lotus

(1927) Series A. No. 10

(International Law and Territorial and Personal Jurisdiction)

On August 2, 1926, a French steamship, the Lotus, proceeding to Constantinople, collided with a Turkish collier Boz-Kourt on the open sea, six miles off Cape Sigri. The Boz-Kourt sank in consequence and eight Turkish nationals on board lost their lives. Lt. Demons, a French citizen, was the officer of the watch on board the Lotus at the time of the collision, while the captain on the Boz-Kourt was Hassan Bey.

The Lotus arrived at Constantinople on August 3, and the Turkish authorities requested Lt. Demons to give evidence at an inquiry. On August 5, Lt. Demons was placed under arrest, as also Hassan Bey. No previous notice was given to the French Consul-General, and the arrest, it was alleged by the Turkish Government, was effected to ensure the trial of the two officers for manslaughter, on the complaint of the families of the victims.

At the criminal court Lt. Demons submitted that the Turkish Courts had no jurisdiction. This plea was, however, overruled and Lt. Demons was sentenced to eight days' imprisonment and a fine of twenty-two pounds; Hassan Bey received a slightly heavier sentence.

The French Government made diplomatic representations and demanded the release of Lt. Demons or the transfer of the case to the French Courts. The Turkish Government agreed to the reference of the conflict of jurisdiction to the Court at The Hague, and accordingly on October 12, 1926, in pursuance of a special agreement drawn up at Geneva, the matter was referred to the Court at The Hague.

The two questions that fell for determination were: (1) Whether Turkey acted contrary to the principles of International Law by instituting joint criminal proceedings on arrival of the French steamer at Constantin ple in pursuance of the Turkish Law against M. Demons, officer of the watch on board the Lotus at the time of the collision; and (2) If the reply be in the affirmative, what pecuniary reparation is due to M. Demons, provided reparation should be made in similar cases according to the principles of International Law.

By the casting vote of the President the Court answered the first question in the negative, holding that Turkey did not act in conflict with the principles of International Law by instituting joint criminal proceedings against the French subject M. Demons in Turkish Courts on the arrival of the S. S. Lotus at Constantinople.

The French Government contended that the Turkish Courts, in order to have jurisdiction, should be able to point to some title to jurisdiction recognized by International Law in favour of Turkey. On the other hand, the Turkish Government pleaded that Art. 15 of the Convention of Lausanne of July 24, 1923, allowed Turkey jurisdiction whenever such jurisdiction did not come into conflict with a principle of International Law. The Court remarked that the latter view seemed to be in conformity with the special agreement itself.

The Court observed: International Law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally

accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

Now the first and foremost restriction imposed by International Law upon a State is that-failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

It does not, however, follow that International Law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of International Law. Such a view would only be tenable if International Law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their Courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under International Law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their Courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which regards as best and most suitable.

In these circumstances the contention of the French Government to the effect that Turkey must in each case be able to cite a rule of International Law authorising her to exercise jurisdiction, was opposed to the generally accepted International Law to which Article 15 of the Convention of Lausanne referred.

As regards the question whether the foregoing consideration applies to criminal jurisdiction as well or whether that is governed by different principles, the arguments advanced by the French Government were the following:

- 1. International Law does not allow a State to take proceedings with regard to offences committed by foreigners abroad simply by reason of nationality of the victim; and such is the situation in the present case because the offence must be regarded as having been committed on board the French vessel.
- International Law recognizes the exclusive jurisdiction of the State whose flag is flown as regards everything which occurs on board a ship on the high seas.
  - 3. Lastly, this principle is especially applicable in a collision case.

As regards the first argument, the Court did not think it necessary to consider the contention that a State cannot punish offences committed abroad by a foreigner simply by reason of the nationality of the victim. It was observed that the Court of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there.

As regards the second argument put forward by the French Government that the State whose flag is flown has exclusive jurisdiction over everything which occurs on board a merchant ship on the high seas, it was observed that it was true that vessels on the high seas are subject to no authority except that of the State whose flag they fly. But it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas. If a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of International Law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting accordingly the delinquent.

As regards the third argument, the Court opined that there was no rule of International Law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown

The offence for which Lt. Demons appears to have been prosecuted was an act—of negligence or imprudence—having its origin on board the Lotus, whilst its effects made themselves felt on board the Boz-Kourt. These two elements are, legally, entirely inseparable, so much so that their separation renders the offence non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is, therefore, a case of concurrent jurisdiction.

It was held that "Turkey, by instituting, in virtue of the discretion which International Law leaves to every sovereign State, the criminal proceedings in question, has not, in the absence of such principles, acted in a manner contrary to the principles of International Law within the meaning of the special agreement."

Dissenting opinions were delivered by six other judges.

[It has been contended that the French view, though overruled by the Court by the casting vote of the President, is the sounder of the two because public vessels enjoy immunity on the high seas. This is admittedly so in times of peace and the collision took place at a time when there was no semblance of war. It has, therefore, been suggested that a far-fetched view was taken by the majority of the members constituting the Court.]

#### 27. The Schooner Exchange v. McFaddon and others

1812) 7 Cranch, 116

[For a discussion of this case please refer to Chapter XVII "Jurisdiction" at p. 227 and Chapter XIX "Jurisdiction over Public and Private Vessels", at p. 232].

#### 28. The Virginius (1873)

(Territorial Waters)

The Virginius was registered as a vessel of the United States in 1870. In 1873, there was an insurrection in Cuba. The ship cleared from Kingston with certain arms and ammunition, which were seized and forfeited. She then sailed from Kingston without any arms ostensibly for Costa Rica, but in reality proceeded towards Cuba. While on the high seas and flying the American flag, she was chased by a Spanish ship of war and captured on a charge of piracy and aiding rebels. On arrival at Santiago de Cuba, the Spanish authorities tried the passengers and crew by court-martial and shot 37 of them, including 16 British subjects. It appeared that the majority of the passengers, who were Cubans, wanted to assist in the Cuban insurrection, although there were some British subjects who had sailed on the belief that the ship was on a bona fide voyage to Costa Rica. The Governments of Britain and America lodged a strong protest and called upon the Spanish Government to stop further executions of their subjects. A conference was held at Washington, wherein Spain agreed to restore the Virginius and the survivors of her passengers and crew. The Spanish Government gave compensation for the families of the executed British subjects.

#### (PRIVY CCUNCIL)

29. The Direct United States Cable

Coy., Ltd

Defendants

#### and

The Anglo-American Telegraph Coy. Ltd. and the New York, Newfoundland, and London Telegraph Coy., Consolidated with and Merged into the said Anglo-American Telegraph Coy., Ltd.

Plaintiffs

On appeal from the Supreme Court of Newfoundland [The Law Reports: Appeal Cases, Vol. II—1876-77]

(Territorial Waters)

The New York, Newfoundland, and London Telegraph Company (hereinafter referred to as the Newfoundland Company), was incorporated by an Act of the Legislature of Newfoundland (17 Vict. c. 2) by which they were required to construct, maintain and operate a line of telegraphs from any point in Newfoundland to any other point. The corporation was given the sole and exclusive right to build, make, occupy, take or work the said line of telegraph between any point in the island for fifty years.

The Anglo-American Telegraph Co., Ltd. (hereinafter called the Anglo-American Coy.) was a joint stock company registered in England under the provisions of the Companies Acts of 1862 and 1867. The amalgamation of the Newfoundland and Anglo-American Companies was effected and the respondents thereupon possessed, maintained and worked several submarine telegraphic cables laid across the Atlantic from Ireland to Newfoundland and thence to the Continent of America.

The appellant company was constituted in 1873, for the purpose of establishing and working telegraphs between Great Britain, Ireland and America, and in the execution of this purpose the appellants in July 1874 laid a submarine cable from New Hampshire, in the United States, to a point in Nova Scotia from there towards Ireland. In laying the last mentioned portion the line skirted the coast of Newfoundland, and the end of a portion of such cable was temporarily secured by a buoy off the coast of Newfoundland within the headlands of Conception Bay.

The respondents filed their bill for injunction on the ground that the appellant had constructed a telegraphic submarine cable from Torbay in Nova Scotia to a point in Conception Bay, within the jurisdiction of the Government of Newfoundland and prayed they might be restrained by injunction from continuing the laying and constructions of any telegraphic wire or cable within the jurisdiction of the Government of the colony of Newfoundland.

The injunction order was granted against the appellants and the same was confirmed by the Supreme Court of Newfoundland. The present appeal was preferred from the order.

Upon a construction of the language of the various enactments, their Lordships observed that the intention of the Legislature was for the benefit of the respondent company to prohibit the use of any part of the territory of Newfoundland by any other person for telegraphic communication.

In the result their Lordships after reviewing the treaty and the enactment opined that the right to legislate over the bays of Newfoundland, of which Conception Bay was one, had been conferred on the Legislature of Newfoundland.

Their Lordships, therefore, recommended to Her Majesty that the order of the Supreme Court of Newfoundland be affirmed and that the appeal be dismissed with costs.

30. Miangas or Palmas) Island

[Award No. 18, Permanent Court of Arbitration at

The Hague: (1929) Hudson Cases, p. 361]

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(State Territory)

Palmas or Miangas is an island lying half-way between Philippine Islands and Netherlands East Indies.

In 1906 a dispute arose as to the sovereignty over the island between the United States of America and the Netherlands. The former claimed it to be a part of the Philippine group ceded to them by Spain by the Treaty of Paris of 1898, while the latter claimed it to be a part of the Netherlands East Indies.

The dispute was referred to the Permanent Court of Arbitration at The Hague. The United States laid its claim on the acquisition by Spain of a title to the sovereignty over the island by discovery, which rights were transferred by Spain to the United States of America by the Treaty of Paris of 1898. The Dutch replied that the Netherlands East India Company had been in its possession, exercising rights of sovereignty from 1677.

In order to found the title of U. S. A., the main question which called for determination was whether Spain, which was alleged to have transferred the sovereignty to U. S. A. in 1898, had any such title over the island in that year. The arbitrator held that there was no mention of any landing in that land by the Spaniards nor had there been any contact with any native inhabitants. No signs of taking possession by Spain had been shown until a very recent date.

Even in the state of International Law prevailing in the first quarter of the 16th century when the alleged discovery is said to have been made by Spain, it was by no means certain that the mere discovery conferred territorial sovereignty and not merely an inchoate title, to be completed eventually by taking possession. It is clear from the state of International Law in the 19th and 20th centuries that discovery alone without any subsequent act of possession could not establish sovereignty over Palmas.

It was held that the island of Palmas or Miangas formed a part of Netherlands territory.

#### 31. North Sea Continental Shelf Cases

(I. C. J. Reports 1969, p. 3)

[Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands].

Continental shelf areas in the North Sea-Delimitation as between adjacent States-Advantages and disadvantages of the equidistance method).

By the two special agreements respectively concluded between the Kingdom of Denmark and the Federal Republic of Germany, and between the Federal Republic and the Kingdom of the Netherlands, the parties submitted to the Court certain differences concerning the delimitation as between the parties of the areas of the continental shelf in the North Sea which appertained to each of them.

The waters of the North Sea are shallow, and the whole seabed consists of continental shelf at a depth of less than 200 metres, except for the formation known as the Norwegian Trough, a belt of water 200-650 metres deep, fringing the southern and south-western coasts of Norway to a width averaging about 80-100 kilometres. Much the greater part of this continental shelf had already been the subject of delimitation by a series of agreements concluded between the United Kingdom (which lies along the whole western side of it) and certain of the States on the eastern side, namely, Norway, Denmark and the Netherlands. These three delimitations were carried out by a drawing of what are known as 'median lines' which may be described as boundaries drawn between the continental shelf areas of 'opposite' States, dividing the intervening spaces equally between them.

A line so drawn, known as an 'equidistance' line may be described as one which leaves to each of the parties concerned all those portions of the continental shelf that are nearer to a point on its own coast than they are to any point on the coast of the other party. An equidistance line may co sist either of a 'median' line between 'opposite' States, or of a 'lateral' line between 'adjacent' States. In certain geographical configurations of which the parties furnished examples, a given equidistance line may partake in varying degree of the nature both of a median and of a lateral line. There exists nevertheless a distinction to be drawn between the two.

The Federal Republic for its part, while recognizing the utility of equidistance as a method of delimitation, denied its obligatory character for States not parties to the Geneva Convention, and contended that the correct rule to be applied, at any rate in such circumstances as those of the North Sea is one according to which each of the States concerned should have a 'just and, equitable share' of the available continental shelf, in proportion to the length of its coastline or sea-frontage.

Alternatively, the Federal Republic claimed that if, contrary to its main contention, the equidistance method was held to be applicable, then the configuration of the German North Sea coast constituted a 'special circumstance' such as to justify a departure from the method of delimitation in this particular case.

The Court, by eleven votes to six, found that, in each case,

- (A) the use of the equidistance method of delimitation not being obligatory as between the Parties; and
- (B) there being no other single method of delimitation the use of which is in all circumstances obligatory;
- (C) the principles and rules of international law applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the agreements of 1 December 1964 and 9 June 1965, respectively, are as follows:
  - (1) Delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each party all those parts of the continental shelf that constitute a natural prolongation to its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other:
  - (2) if, in the application of the preceding sub-paragraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a regime of joint jurisdiction, user or exploitation for the zones of overlap or any part of them;
- (D) In the course of the negotiations, the factors to be taken into account are to include:
  - (1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
  - (2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;

(3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.

# \_32. The Corfu Channel Case:

#### Albania and the United Kingdom

[INTERNATIONAL COURT OF JUSTICE, APRIL 9, 1949.]

(I. C. J. Reports, 1949, p. 4)

(Maritime Belt : Territorial Jurisdiction : Torts)

The North Corfu Channel constitutes a trontier between Albania and Greece, a part of it lying wholly within the territorial waters of these States. It had been swept by the British Navy in October 1944 when there were no mines. A check-up in Junuary 1945 revealed the same result. The route had been announced safe.

On May 15, 1946, British cruisers Orion and Superb, while passing southward through the North Corfu Channel, were fired at by an Albanian battery. On October 22, 1946, two British warships were seriously damaged by striking mines in Albanian territorial waters. The explosion resulted in loss of lives among the crews. On November 12 and 13, the British Navy swept the Channel without obtaining the consent of the Albanian authorities and discovered a newly laid field of anchored mines at the place where had occurred the explosions on October 22 and which lay in Albanian waters.

Great Britain raised the matter in the Security Council alleging that Albania was responsible for the presence of the mines in the Channel.

The case came before the International Court of Justice under a special agreement of March 25, 1948, submitting the following two questions for decision:

- 1. "Is Albania responsible under International Law for the explosions which occurred on the 22nd October, 1946, in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?
- 2. "Has the United Kingdom under International Law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November, 1946, and is there any duty to give satisfaction?"

The Court reached the conclusion that Albania was responsible under International Law for the explosions which occurred on October 22, 1946, in Albanian waters, and for the damage and loss of human life which resulted

from them and that there was a duty upon Albania to pay compensation to the United Kingdom.

Kingdom Government violated Albanian sovereignty by sending the warships through this Strait without the previous authorization of the Albanian Government.

It is, in the opinion of the Court, generally recognised and in accordance with international customs that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.

Having regard to the various considerations, the Court arrived at the conclusion that the North Corfu Channel should be considered as belonging to the class of international highways through which passage could not be prohibited by a coastal State in time of peace...

For these reasons the Court was unable to accept the Albanian contention that the Government of the United Kingdom had violated sovereignty by sending the warships through the Strait without having obtained the previous authorization of the Albanian Government.....

The Albanian Government further contended that the sovereignty of Albania was violated because the passage of the British warships on October 22, 1946, was not an inn cent passage.....

......Having regard, however, to all the circumstances of the case, the Court was unable to characterize these measures taken by the United Kingdom authorities as a violation of Albania's sovereignty.....

the Royal Navy in Albanian waters on November 12 and 13, 1946. This is the mine-sweeping operation called "Operation Retail" by the parties during the proceedings.

The Court observed..... The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international erganization, find a place in International Law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.

The United Kingdom Agent further classified "Operation Retail" among methods of self-protection or self-help. The Court cannot accept this defence either. Between independent States respect for territorial sovereignty that the Albanian Government's complete failure to carry out its duties after circumstances for the action of the United Kingdom Government. But to declare that the action of the British Navy constituted a violation of Albanian sovereignty.

For these reasons, the Court, on the first question put by the Special Agreement of March 25, 1948, by eleven votes to five, gives judgment that the

People's Republic of Albania is responsible under International Law for the explosions which occurred on October 22, 1946, in Albanian waters, and for the damage and loss of human life that resulted therefrom;.....on the second question put by the Special Agreement of March 25, 1948, by fourteen votes to two, gives judgment that the United Kingdom did not violate the sovereignty of the People's Republic of Albania by reason of the acts of the British Navy in Albanian waters on October 22, 1946; and, unanimously, gives judgment that by reason of the acts of the British Navy in Albanian waters in the course of the operation of November 12 and 13, 1946, the United Kingdom violated the sovereignty of the People's Republic of Albania.

#### 33. Anglo-Norwegian Fisheries Case

[I. C. J. Reports 1951, p. 116] (Territorial Sea)

[For a discussion of this case, please refer to Chapter XXXIX "The International Court of Justice" at p. 480.]

#### PERMANENT COURT OF INTERNATIONAL JUSTICE

34. The S. S. Wimbledon

[ 1923; Series A. No. 1.]

(Territorial Jurisdiction)

On the 21st of March, 1921, the Wimbledon, a British vessel chartered by a French company, was refused access to the Kiel canal by the German authorities on the ground that the vessel was carrying military materials to Poland which was then at war with Russia. On a joint application made by the Governments of Great Britain, France, Italy and Japan against Germany the case was taken cognizance of by the Permanent Court of International Justice. The applicants contended that the German Government was wrong in refusing access to the Kiel canal as she was bound by the provisions of the Treaty of Versailles, 1919, Article 380 whereof provided that "Kiel canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality." The applicants consequently claimed damages with interest. The Court held that it was the duty of Germany to have permitted the passage of the Wimbledon through the Kiel canal within the meaning of Article 380 of the Treaty of Versailles.

#### 35. The I'M Alone

[ 3 Reports of Arbitral Awards ]

(Territorial Jurisdiction)

[ For a discussion of this case please refer to Chapter XIV "State Territory" at p. 182.]

# 30. Case concerning The Temple of Preah Vihear

(Cambodia v. Thailand)

[I. C. J. Reports 1962, p. 6]

(Territorial sovereignty : Title deriving from treaty)

In its Judgment of 26th May 1961, by which it upheld its jurisdiction to adjudicate upon the dispute submitted to it by the Application filed by the Government of Cambodia on 6th October 1959, the Court described in the following terms the subject of the dispute: "In the present case, Cambodia alleges a violation on the part of Thailand of Cambodia's territorial sovereignty over the region of the Temple of Preah Vihear and its precincts. Thailand replies by affirming that the area in question lies on the Thai side of the common frontier between the two countries, and is under the sovereignty of Thailand. This is a dispute about territorial sovereignty. Accordingly, the subject of the dispute submitted to Court is confined to a difference of view about sovereignty over the region of the Temple of Preah Vihear.

The Temple of Preah Vihear is an ancient sanctuary and shrine situated on the borders of Thailand and Cambodia. Although now partially in ruins, used as a place of pilgrimage. It stands on a promontory of the same name, a general way, constitutes the boundary between the two countries in this region—Cambodia to the south and Thailand to the north. Considerable above the Cambodian plain. This is the situation at Preah Vihear itself, of high ground jutting out into the plain. From the edge of the escarpment, to the Nam Moun river, which is in Thailand.

In February 1949, not long after the conclusion of the proceedings of the Franco-Siamese Conciliation Commission, in the course of which Thailand did not raise the question of Preah Vihear, France addressed a Note to stationing of four Siamese keepers at the Temple, and asking for information. There was no reply to this Note, nor to a follow-up Note of March 1949. In the ground on which she considered Preah Vihear to be in Cambodia, and pointing out that a map produced by Thailand herself had recognised this an error in this Note, the significance of the latter was that it contained no reply. In July 1950, a further Note was sent. This too remained unanswered.

In these circumstances Cambodia, on attaining her independence in 1953, proposed, for her part, to send keepers or guards to Temple, in the assertion or maintenance of her position. However, finding that Thai keepers were already there, the Cambodian keepers withdrew, and Cambodia sent a Note dated January 1954 to the Government of Thailand asking for information. This received a mere acknowledgment, but no explanation. Nor was there, even then, any formal affirmation of Thailand's claim. At the end of March 1954, the Government of Cambodia drawing attention to the fact that no substantive reply to its previous Note had been received, notified

the Government of Thailand that it now proposed to replace the previously withdrawn Cambodian keepers or guards by some Cambodian troops. this Note Cambodia specifically referred to the justification of the Cambodian claim contained in the French Note of May 1949. This Cambodian Note also was not answered. However, the Cambodian troops were not in fact sent; and in June 1954, Cambodia addressed to Thailand a further Note stating that as information had been received to the effect that Thai troops were already in occupation, the despatch of the Cambodian troops had been suspended in order not to aggravate the situation. The Note went on to ask that Thailand should either withdraw her troops or furnish Cambodia with her views on the matter. This Note equally received no reply. But the Thai "troops" (the Court understands that they are in fact a police Again, therefore, it would seem that Thailand, while force) remained. taking certain local action, was not prepared to deny the French and Cambodian claim at the diplomatic level.

No further diplomatic correspondence was produced to the Court; but eventually, in 1958, a conference was held at Bangkok between Thailand and Cambodia, to discuss various territorial matters in dispute between the Parties, including that of Preah Vihear. The representative of Thailand having declined to discuss the legal aspects of the matter, the negotiations broke down and Cambodia instituted the present proceedings.

Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it.

The Court accordingly held that the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia; finds in consequence that Thailand is under an obligation to withdraw any military of police forces or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory; and that Thailand is under an obligation to restore to Cambodia any objects of the kind specified in Cambodia's submission which may, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thailand in the Temple area by the Thailand in the Temple area by the Thailand in the Temple or the Temple area by the Thailand in the Temple or the Temple area by the Thailand in the Temple or the Temple area by the Thailand in the Temple or the Temple area by the Thailand in the Temple or the Temple area by the Thailand in the Temple or the Temple area by the Thailand in the Temple or the Temple area by the Thailand in the Temple of the Temple area by the Thailand in the Temple or the Temple area by the Thailand in the Temple or the Temple area by the Thailand in the Temple or the Temple area by the Thailand in the Temple or the Temple area by the Thailand in the Temple or the Temple area by the Thailand in the Temple or t

#### 37. Stoeck v. Public Trustee

(1921) 2 CH. 67 at p. 78 (Nationality)

The plaintiff, Stoeck, was a neutral born Prussian subject. He obtained his discharge from Prussian nationality. He stayed in England for a long time but did not get himself naturalised there. During the First Great World War (1914-1918) he was interned and deported to Holland. He then shifted to Germany. He was the owner of some shares in a limited company in England and the Board of Trade in England proposed to attach those shares on the ground that he was an enemy. Russell, J. observed in that case that "the question to what State a person belongs must ultimately be decided by the Municipal Law of the State to which he claims to belong or to which it is alleged that he belongs. It was held that Stoeck had lost his German nationality and as such he was not to be treated as a German national. Russell, J. further observed that statelessness was a condition recognised by English law as also by German law. He quoted with approval the following passage from Oppenheim's book (Vol. 1):

85

"A person may be destitute of nationality, knowingly or unknowingly, intentionally or through no fault of his own."

#### 38. Kramer v. Attorney-General

(1923) A. C. 528

(Rights of Individual: Dual Nationality)

The appellant Kramer was born in England by a German father. When the appellant was of two years, his father obtained a grant of German nationality for himself and his infant children, including the appellant, who continued to remain thereafter a German national. He served in the German army for one year and after his discharge took up residence in Siam and got himself registered with the German Consulate there. In 1917 when Siam declared war against Germany he was deported to India and interned there.

The appellant had some property in the United Kingdom and after the armistice he brought an action against the respondent claiming a declaration that his property rights and interests in England were not subject to any charge under Article 297 of the Treaty of Versailles.

Viscount Cave, L. C., observed that the appellant was a person of dual nationality, but that it could not be held that Germany in agreeing to a charge on the property of its own nationals situate in the territories of the Allied Powers had stipulated for an exception in favour of those persons who were also subjects of those powers and that it was not possible to find any intention of such an exception on the language of that Article. It was held that the appellant was a German national, nonetheless because he was a British subject. The appellant's co-tention accordingly failed.

#### Naim Molven, Owner of Motor Vessel Asya v. Attorney General for Palestine

(1948 a. C. 351)

40. Ker v. Illinois

[(1886) (119 U. S. 436)]

#### 41. Ex Parte Elliott

[1949) All E. R. 373]

[For a discussion of these cases please see Chap. XXV, "Place of the Individual in International Law" at pp. 295 and 296].

#### 42. U. S. A. v. Rauscher

[(1886) (119 U. S. 407)]

(Extradition)

The defendant, Raucher, having been charged with murder on board an American vessel on the high seas fled to England. On demand by the Government of U. S. A. he was surrendered on that charge. But the Circuit Court of the United States for the Southern District of New York, in which he was tried, did not proceed against him for murder, but for an offence of cruel and unusual punishment. The Judges of the Circuit Court being divided in their

opinion, the case was referred to the Supreme Court for its judgment whether this alteration in the charge could be done.

The Supreme Court laid down:

- 1. That apart from treaties there was no well defined obligation on one country to deliver up fugitives from justice to another.
- 2. That a treaty to which the United States is a party is a law of the land, which all courts, State and national, are to take judicial notice.
- 3. That the defendants could not be lawfully tried for any other offence than murder, because a person who has been brought within the jurisdiction by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release no trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.
- 4. That the circumstances that the same evidence might be sufficient to convict for the minor offence which was produced to support the charge of murder did not justify a departure from the principle of the treaty, the minor charge being an offence for which the treaty made no provision.

# QUEEN'S BENCH 43. In re. Castioni (1890) LAW REPORTS, (1891) QUEEN'S BENCH DIVISION, p. 149

(Extradition)

Castioni was a Swiss national. He had been accused of taking part in an insurrection against the authorities of the Canton of Ticino (Switzerland).

Political discontent had been felt in the Canton for some time and the Government refused to take a popular vote on the question of the revision of the constitution. As a result of this refusal an armed crowd seized the arsenal, took arms and attacked the municipal palace at the Bellinzona. In the course of the attack a municipal commissioner, Rossi, was killed, and evidence was led to show that Castioni had been the murderer. Castioni later on fled to England. Extradition proceedings were initiated on behalf of the Swiss Government. The British Government ordered the release of the prisoner on the ground that the offence was a political one. The Queen's Bench Division held that at the moment at which Castioni fired the shot the reasonable presumption was that he fired it thinking it would advance, and that it was an act which was in furtherance of, and done intending it to be in furtherance of, the very object which the rising had taken place in order to promote, and to get rid of the government, who, he might, until he had absolutely got into the palace, have supposed were resisting the entrance of the people to that place. It was further held that at the time at which the shot was fired he acted in furtherance of an unlawful rising to which at that time he was a party, and an active party -a person who had been doing active work from a very much earlier period, and in which he was still actively engaged. Consequently the act of the prisoner was held to be connected with a political movement and as such was incidental to and formed a part of political disturbance. Since political disturbances are non-extraditable, his extradition to Switzerland was refused.

44. In Re. Meunier (1894) LAW REPORTS (1894) 1 QUEEN'S BENCH DIVISION, p. 415 (Extradition)

Meunier was an anarchist. He had caused explosions in a Paris cafe and a French barrack. Subsequently the fled to England. The Government of France demanded his extradition on the above charge from Great Britain. He set up the plea of political offence. It was held by the Court that "in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the government of their own choice on the other, and that if the offence is committed by one side or the other in pursuance of that object it is a political offence, otherwise not.". The Court further held that the party with whom Meunier was identified was the enemy of all governments and their efforts were directed primarily against the general body of citizens. The anarchist Meunier was accordingly delivered to the French Government.

[There is a wide gap in the ratio of the decision of this case and that of Castioni. The decision is clearly in contrast with the earlier decision.]

## PERMANENT COURT OF ARBITRATION

45. Savarkar's Case (1911 No. IX)

(Territorial Jurisdiction : Extradition)

[For a discussion of this case pleas: see Chapter XXIV "Extradition at p. 277].

## 46. A Recent German Decision

[In a German case,1 the appellant, a Yugoslav citizen, had come to Germany for the purpose of setting up an exhibition pavilion for a Belgrade firm, with the consent of the Yugoslav authorities and did not return to his native country but instead requested asylum and recognition as a foreign refugee in Germany. He was indicted in a Belgrade court for a series of crimes which he had allegedly committed in his capacity as manager of a nationalized publishing enterprise. These crimes were equivalent to embezzlement, fraud, conversion and forgery under German Law. On that basis the Yugoslav Government requested the extradition of its national, declaring that the accused would not be prosecuted for any crimes or acts other than those named in the request, and that his personal liberty would not be restricted. The appellant denied having committed the crimes with which he was charged, protested against extradition and relied on the right of asylum which Article 16 of the Basic Law guarantees to political persecutees.

The appellate court ordered him to be extradited on the ground that the appellant had not been connected with a political crime nor did he meet the constitutional requirements of political asylum. In his appeal to the Federal Constitutional Court, the appellant alleged that he had aroused the displeasure of the Yugoslav consul in the city where the exhibition was held because he had not decorated the Yugoslav pravilion lavishly enough and because he had made contacts with Yugoslavemigrants and that he had become a member of the Serbian National Association in Germany, which was directed against Com-

<sup>1.</sup> The American Journal of International Law, Vol. 54 No. 2 (April 1960), p. 416.

munism and the Tito regime, and also an auxiliary of the British at my in Germany, which was composed of Yugoslav prisoners of war and Serbian troop units which had fought on the German side.

The Federal Constitutional Court granted the appellant political asylum under Art. 16 of the Basic Law and observed that political asylum was understood as a right granted to a foreigner who cannot continue living in his own country because he is deprived of liberty, life or property by the political system prevailing there. The concept of political persecution must not be narrowly interpreted. The concept of political persecute must not be limited to so-called political offenders within the meaning of the Extradition Law, i. e. to persons whose extradition is demanded by reason of a criminal act as defined in that law, but must be extended to persons prosecuted for non-political offences where such persons, if extradited, would be liable in their home country to suffer measures of persecution involving danger to life and limb or restrictions of personal liberty for political reasons.

The Federal Constitutional Court further observed that the assurance on the part of the requesting state that the accused would be prosecuted only for the crimes specified in the request for extradition, which in former times was an adequate safeguard against political persecution of persons extradited, is no longer effective today. The 'politization' of large spheres of life and the utilization of criminal law for securing and carrying out social and political revolutions have blurred the boundary line between 'criminal' and 'political' offences in many states.

he Federal Constitutional Court held that in the present case the appellant's fear that if he returned to Yugoslavia he would be persecuted for his political connections alone was justified. Therefore he was ordered not to be extradited.]

#### 47. King's Bench Rex v. Godfrey (1923) 1 K. B. 24 (Extradition)

The applicant belonged to a member of a firm which carried on business in England. Certain members of the firm while in Switzerland obtained goods from the Swiss persons on false pretences and later on sold the goods in England. The applicant was neither in Switzerland when false pretences were made nor had he been there afterwards. He was, however, committed for extradition to Switzerland on the ground that he was an accessory to the offence of misdemeanour by making false pretences and was liable as a principal. He applied for a writ of habeas corpus on the ground that he was not a 'fugitive criminal' within the meaning of the Extradition Act, 1870. His application was dismissed.

Lord Hewart, C. J., rejecting the plea of the applicant, observed that although "at the first blush it might appear that when a man is spoken of as a fugitive what is meant is that he has fled from one country to another country, ......it seems that the words 'fugitive criminal' are equally satisfied whether the man has physically been present in that other country or not, if he committed the crime there. In the one case as in the other he is seeking to escape the penal consequences of his act." It did not seem to him to be necessary to the idea of fugitiveness that the alleged criminal should have been resident in the country where the crime was committed.

## 43. The Eisler Extradition Case



(Extradition)

Gerhart Eisler, an alien communist, was convicted in America of some criminal offences. He was let off on bail during the pendency of appeal in the United States Court against his conviction. On May 12, 1949, he fled from New York on S. S. The Batery to Poland. The Government of U. S. A. asked the British Government to arrest Eisler at Southampton and to detain him for extradition proceedings. On the refusal of the captain of the ship to surrender him, he was forcibly taken away by the British police officers.

Extradition proceedings were started at a magistrate's court in England. It was found that Eisler had been convicted of two crimes in the United States, viz., contempt of the Congress and making a false affidavit to get permission to depart from U. S. A.

The offences for which Eisler had been convicted were found to be not included in the extradition treaty between U. S. A. and U. K. It was, however, pleaded for U. S. A. that perjury was an offence on the basis of which extradition of the prisoner could be made. The magistrate having seisin of the extradition proceedings held that perjury was a technical matter and many the mischief of perjury. Further, for the false statement made by Eisler on was taken. In the result, it was held that the offence for which Eisler had been convicted in America did not fall under the technical head of perjury in England.

On the finding that the U.S. A. could not establish that Eisler was guilty of an offence which was extraditable, Eisler was discharged and the application for extradition filed by U.S. A. was rejected.

[This case emphasises the principle of double criminality, i. e., the crime must be an offence in both the States. No person is to be extracited whose deed is not a crime according to the criminal law of the State which is asked to extracite as well as of the State which demands extradition.]

#### 49. Colombian-Peruvian Asylum Case Haya De La Torre Case

[1. C. J. Reports (1951), p. 71]

(Extradition)

On October 15, 1949, the Colombian Government sent an application to the International Court of Justice as a result of which the present proceeding was started against Peru. The facts leading to the presentation of the application may shortly be stated as under:

The application alleged that on January 3, 1949, Victor Raul Haya do la Torre, a Peruvian national and a political leader accused of having instigated a military rebellion, sought asylum in the Colombian Embassy at Lima, (Peru), that the Colombian Ambassador granted the protection sought and that Peru refused to issue a safe conduct so that the refugee could leave the country.

The application was based on the obligations of Peru and Colombia resulting from the Bolivarian Agreement on Extradition, 1911, and the Pan-American Havana Convention on Asylum, 1928.

The application asked the Court to answer the following two questions:

First question.—Within the limits of the obligations resulting in particular from the Bolivarian Agreement on Extradition of July 18, 1911, and the Convention on Asylum of February 20, 1928, both in force between Colombia and Peru and in general from American International Law, was Colombia competent, as the country granting asylum, to qualify the offence for the purposes of said asylum?

Second question.—In the specific case under consideration, was Peru, as the territorial State, bound to give the guarantees necessary for the departure of the refugee from the country, with due regard to the inviolability of his person?

The Court by its judgment, dated November 20, 1950, answered both these questions in the negative, but at the same time it held that Peru had not proved that Haya de la Torre was a common criminal. Further, the Court found it in favour of the counterclaim, submitted by Peru, holding that the asylum had been irregularly granted because Haya de la Torre had sought refuge in the Embassy some three months after the suppression of the military rebellion, which showed that the urgency prescribed by the Hayana Convention as a condition for the regularity of asylum no longer existed.

Haya de la Torre Case.—After the delivery of judgment by the Court on November 2), 1950, Peru called upon Colombia to surrender Haya de la Torre. Colombia refused to comply with the demand of Peru, maintaining that neither the texts in force nor the Court's judgment placed her under an obligation to surrender the refugee to the Peruvian authorities. Thereupon proceedings were initiated by Colombia by means of a fresh application filed before the Court. On June 13,1951, the Court upheld the entention of Colombia. It held that although the Havana Convention expressly prescribed the surrender of common criminals to the local authorities, no obligation of the kind existed in regard to political offenders. It, however, reiterated its earlier view that asylum had been irregularly granted and that, although on this ground Peru was entitled to de nand its termination, Colombia was not bound to surrender the refugee. It was observed that these two conclusions were not contradictory because there were other ways in which the asylum could be terminated besides the surrender of the refugee.

#### 50. The Soblen Case

Regina v. Governor of Brixton Prison Ex Parte Soblen (Deportation and Extradition)

[(1963) 2 Q. B. 243]

Dr. Soblen, a naturalised American citizen, was convicted in the United States of conspiring to transmit defence information to the Soviet authorities. The U. S. Supreme Court rejected his appeal. Dr. Soblen, who was on bail, then, fled to Israel on the strength of a passport issued to his deceased brother. On the request of the U. S. Government, the Israel Government consented to his deportation in the custody of a U. S. officer. Before the plane landed at London, Dr. Soblen inflicted knife injuries on himself and he was therefore shifted to a London hospital. The U. K. Government served on Dr. Soblen a notice of refusal of leave to land under the Aliens Order, 1953, a few days later while he was in the hospital. He applied for habeas corpus on the ground

that having impliedly been granted leave to land by virtue of his removal to a hospital in U. K. territory, he could not now be detained in cust ody under the Order. The Divisional Court and the Court of Appeal rejected his application saying that there had, in the circumstances, been no implied grant of leave to land. The U. K. authorities then passed a deportation order against him under article 20 of the Aliens Order, 1953. Dr. Soblen challenged its validity in court. One of his contentions was that the order was invalid as it was being used to effect an extradition. The Court of Appeal held that the court could not go behind the order to establish its legality, provided it was good on the face of it. It was of the opinion that there was no evidence to support a supposition that the U. K. authorities were using the deportation order for an ulterior purpose and there was nothing to question the bona fides of the order.

#### 51. The Tarasov Extradition Case

(Extradition)

On 7th January, 1963, the Soviet Embassy in India made a requisition under section 4 of the Indian Extradition Act of 1962, requesting the Government of India to institute proceedings against V. S. Tarasov, a. Soviet citizen, who, it was alleged, had committed a theft on a Soviet ship. Section 5 of the Act lays down that on requisition made by a foreign State the Central Government may, if it thinks fit, issue an order to any magistrate directing him to inquire into the case. Tarasov was brought before a First Class Magistrate of New Delhi to stand extradition inquiry. He denied the charge and explained that he was earlier arrested on a complaint of theft made by the Soviet Vice-Consul in Calcutta and was discharged by the Presidency Magistrate, Calcutta, for want of evidence. He also contended that he had sought political asylum from the U. S. Government and therefore a false case had been started against him.

According to section 7 (3) of the Act, the magistrate is not competent to go into the merits of the extradition case and he shall only inquire whether a prima facie case against the offender is made out. If a prima facie case is made out the magistrate may commit the fugitive to prison and await orders from the Central Government. If it is not, the alleged offender is to be discharged. In the case of Tarasov, the trial magistrate, after referring to a decision of the Supreme Court and also of the House of Lords, laid down the following principles in order to constitute a prima facie case in extradition cases—(a) the witnesses should be entitled to a reasonable degree of credit, (b) the degree of proof should be higher than in ordinary criminal prosecutions and (c) the evidence must be incontrovertible, raising probable and strong presumption of the offence against the accused.

On the basis of the evidence produced, the trial magistrate came to the conclusion that no prima facie case was established.

The Soviet authorities also urged that there existed an extradition agreement between the Soviet Union and India, in the sense that the Government of India had by notification extended the application of the Act to Soviet Union also. But the magistrate held that what was necessary was a formal treaty and not an agreement.

On the basis of these findings, the magistrate discharged Tarasov.

#### 52. Re. Kolczynski and others

[ (1955) 1 All E. R. 31]

(Extradition)

[Please refer to Chapter XXIV at p. 266]

# 53. Zacharia v. Republic of Cyprus and another Arestidou v. Same

[(1962 2 All E. R. 438]

(Extradition-Discharge of Fugitive)
Please refer to Chapter XXIV at p. 267]

#### THE SUPREME COURT OF INDIA

#### 44. The State of West Bengal and another v. Jugal Kishore More and another

(1970, (1) S. C. J. 39

[Extradition. - A political act, either in pursuance of a treaty or by an ad hoc agreement.]

Facts.—In the course of investigation of offences under sections 420, 467 471 and 120-B, Indian Penal Code, the officer in charge of the investigation submitted an application before the Chief Presidency Magistrate Calcutta, for an order that a warrant for the arrest of Jugal Kishore More and certain other named persons be issued and that the warrant beforwarded with the relevant records and evidence to the Ministry of External Affairs, Government of India, for securing extradition of More who was then believed to be in Hong Kong. It was stated in the application that More and others "were parties to a criminal conspiracy in Calcutta between May 1961 and December 1962 to defraud the Government of India in respect of India's foreign exchange", and their presence was required for trial.

The Chief Presidency Magistrate held an enquiry and recorded an order on 19th July, 1965, that on the materials placed before him, a prima facie case was made out of a criminal conspirac, which was "hatched in Calcutta" within his jurisdiction and More was one of the conspirators. He accordingly directed that a non-bailable warrant be issued for the arrest of More and the warrant be sent to the Secretary Home (Political) Department, Government of West Bengal, with a request to take necessary steps to ensure execution of the warrant. A copy of the warrant was sent to the Commissioner of Police, Calcutta, for information. The Chief Presidency Magistrate forwarded to the Government of West Bengal, the warrant with attested copies of the evidence recorded at the enquiry and photostat copies of documents tendered by prosecution in evidence. The warrant was forwarded by the Government of West Bengal to the Ministry of External Affairs, Government of India, The Ministry of External Affairs forwarded the warrant to the High Commissioner for India. Hong Kong, who in his turn, requested the Colonial Secretary, Hong Kong, for an order extraditing More under the Fugitive Offenders Act, 1881, to India for trial for offences described in the warrant. The Central Magistrate, Hong Kong, endorsed the warrant and directed the Hong Kong Police "pursuant to section 13 of Part II and section 26 of Part IV of the Fugitive Offenders Act, 1881" to arrest More.

More was arrested on 24th November 1965. By order dated 4th April, 1966, the Central Magistrate, Hong Kong, overruled the objection raised on behalf of More that the Court had no jurisdiction to proceed in the matter under the Fugitive Offenders Act, 1881, since the Republic of India was no longer a "British Possession".

On 16th May, 1966. Hanuman Prasad, father of More, moved in the High Court of Calcutta a petition under section 439 of the Code of Criminal Procedure and Art. 227 of the Constitution for an order quashing the warrant of arrest issued against More and all proceedings taken pursuant thereto and restraining the Chief Presidency Magistrate and the Union of India from taking any further steps pursuant to the said warrant of arrest and causing More to be extradited from Hong Kong to India. The petition was heard before a Division Bench of the High Court, and the learned Judges constituting the Bench differed in their views. The case was then posted for hearing before a third judge, who held that the Chief Presidency Magistrate had no power to issue the warrant of arrest in the manner he had done, -a manner which in his view was unknown to the Code of Criminal Procedure, since the Fugitive Offenders Act, 1881, had ceased, on the coming into force of the Constitution, to be part of the law of India, and could not on that account be resorted to for obtaining extradition of offenders from another country. The State of West Bengal appealed to the Court with special leave.

Their lordships of the Supreme Court on a consideration of the entire matter observed as follows:—

Judgment .- Extradition is the surrender by one State to another of a person desired to be dealt with for crimes of which he has been accused or convicted and which are justiciable in the Courts of the other State. Surrender of a person within the State to another . State-whether a citizen or an alienis a political act done in pursuance of a treaty or an arrangement ad hoc. It is founded on the broad principle that it is in the interest of civilized communities that crimes should not go unpunished, and on that account it is recognised as a part of the comity of nations that one State should ordinarily afford to another State assistance towards bringing offenders to justice. The law relating to extradition between independent States is based on treaties. But the law has operation-national as well international. It governs international relationship between the sovereign States which is secured by treaty obligations. But whether an offender should be handed over pursuant to a requisition is determined by the domestic law of the State on which the requisition is made. Though extradition is granted in implementation of the international commitments of the State the procedure to be followed by the Courts in deciding, whether extradition should be granted and on what terms, is determined by the municipal law.

Sanction behind an order of extradition is, therefore, the international commitment of the State under which the Court functions, but courts jealously seek to protect the right of the individual by insisting upon strict compliance with the conditions precedent to surrender. A warrant issued by a Court for an offence committed in a country from its very nature has no extraterritorial operation. It is only a command by the Court in the name of the sovereign to its officer to arrest an offender and to bring him before the Court. By making a requisition in pursuance of a warrant issued by a Court of a State to another State for assistance in securing the presence of the offender, the warrant is not invested with extra-territorial operation. If the other State requested agrees to lend its aid to arrest the fugitive the arrest is made either by the issue of an independent warrant or endorsement or authentication of the warrant of the Court which issued it. By endorsement or authentication of a warrant the country in which an offender has taken refuge signifies its willingness to lend its assistance, in implementation of the treaties or international commitments and to secure the arrest of the offender.

The functions which the Courts in the two countries perform are therefore different. The Court within whose jurisdiction the offence is committed decides whether there is prima facie evidence on which a requisition may be made to another country for surrender of the offender. When the State to which a requisition is made agrees consistently with its international commitments to lend its aid the requisition is transmitted to the police authorities, and the Courts of that country consider, according to their own laws, whether the offender should be surrendered—the enquiry is in the absence of express provisions to the contrary relating to the prima facie evidence of the commission of the offences which is extraditable, the offence not being a political offence nor that the requisition being a subterfuge to secure custody for trial for a political offence.

Their lordships observed that they were not called upon to consider whether in exercise of the power under the Fugitive Offenders Act a Magistrate in India may direct extradition of fugitive offenders from a "British Possession," who has taken refuge in India. It is sufficient to observe that the Colonial Secretary of Hong. Kong was according to the law applicable in Hong Kong competent to give effect to the warrant issued by the Chief. Presidency Magistrate, Calcutta, and the Central Magistrate, Hong Kong, had jurisdiction under the Fugitive Offenders Act, and, after holding inquiry, to direct that More be surrendered to India. The order of surrender was valid according to the law in force in Hong Kong, and their lordships were unable to appreciate the grounds on which invalidity could be attributed to the warrant issued by the Chief Presidency Magistrate, Calcutta, for the arrest of More.

The Chief Presidency Magistrate had the power to issue the warrant for the arrest of More, because there was prime facie evidence before him that More had committed certain offences which he was competent to try. If the warrant was to be successfully executed against. More who was not in India, assistance of the executive Government had to be obtained. It is not an invasion upon the authority of the Courts which they are informed that certain procedure may be followed for obtaining the assistance of the executive Department of the State in securing through diplomatic channels extradition of fugitive offenders. In pursuance of that warrant on the endorsement made by the Central Magistrate, Hong Kong, More was arrested. The warrant was issued with the knowledge that it could not be enforced within India and undoubtedly to secure the extradition of More. Pursuant to the warrant the Ministry of External Affairs, Government of India, moved through diplomatic channels and persuaded the Colonial Secretary of Hong Kong to arrest and deliver More. Issue of the warrant and the procedure followed in transmitting the warrant were not illegal, not even irregular.

It is true that under the Extradition Act XXXIV of 1962 no notification has been issued including Hong Kong in the list of the Commonwealth countries from which extradition of fugitives from justice may be secured. The provisions of the Extradition Act, 1962, cannot be availed of for securing the presence of More for trial in India. But that did not, in their lordships' judgment, operate as a bar to the requisition made by the Ministry of External Affairs, Government of India, if they were able to pursuade the Colonial Secretary, Hong Kong, to deliver More for trial in this country. If the Colonial Secretary of Hong Kong was willing to hand over More for trial in this country, it cannot be said that the warrant issued by the Chief Presidency Magistrate for the arrest of More with the aid of which requisition for securing his presence from Hong Kong, was to be made, was illegal.

Their lordships were unable to agree with the High Court that because of the enactment of the Extradition Act XXXIV of 1962 the Government of India was prohibited from securing through diplomatic channels the extradition of an offender for trial of an offence committed within India. There was, in their lordships' judgment, no illegality committed by the Chief Presidency Magistrate Calcutta, in sending the warrant to the Secretary Home (Political) Department, Government of West Bengal, for transmission to the Government of India, Ministry of External Affairs, for taking further steps for securing the presence of More in India to undergo trial.

The appeal was, therefore, allowed and the order passed by the High Court set aside. The writ petition filed by More was dismissed.

### 55. Juan Ysmael and Company v. Government of the Republic of Indonesia

[(1954 3 All E. R. 236].

#### (Sovereign Immunity)

On the motion of the appellant company, claiming as owners, a writ in rem was issued against a steamship addressed to all parties interested in the said steampship. The Government of Indonesia appearing under protest sought the setting aside of the writ on the ground that it impleaded a foreign sovereign State who was the owner, or was in possession, or control or entitled to possession, of the vessel. Two agents of the Indonesian Government filed affidavits in support of the motion, who on being called for cross-examination failed to attend the court, the Indonesian Government having claimed diplomatic immunity for its agents. The Court rejected their claim for diplomatic immunity, with the result that their affidavits were removed from the record as their deponents had not appeared in court for their cross-examination.

The trial judge in Hongkong dismissed the motion to set aside the writ and ordered possession of the vessel to the appellant company. The Hongkong appellate court took a contrary view, holding that the action in rem impleaded a sovereign State. It set aside the writ and all subsequent proceedings.

The Judicial Committee examined the transactions relating to the vessel and came to the conclusion that there was no evidence to support the Government's claim that the vessel was its property. The company had chartered the ship to the Government for a fixed period for the purpose of carrying troops and the Government were negotiating for the purchase of the ship from company's agent who had no authority to conclude a sale on the terms offered by the Government, which fact was known to the Government.

Their Lordships found dicta in the Cristina, Haile Selassie v. Cable and Wireless Ltd. and the Arantzazu Mendi to support the view that, where a claim for immunity was made by a foreign sovereign it was not enough that it rested on a bare assertion or claim of right: there must be evidence before the court on which it could be shown that the question which was to be decided was one of competing rights. Then and then only could the principle of immunity arise.

## 56. N. Y. World's Fair 1964-65 Corp. Republic of Guinea (159 N. Y. Law Journal, 15)

[Supreme Court, Queens Country, N. Y. June 27, 1961]

(Sovereign immunity)

The plaintiff attached the bank account of the defendant, the Republic of Guinea, with a view to acquiring in rem jurisdiction in an action to recover unpaid rents and damages to real property which the defendant had allegedly occupied on the grounds of the New York World's Fair. The defendant pleaded sovereign immunity for vacating the attachment. The Court granted the motion.

Justice Fitzpatrick observed that in an opinion letter issued at the request of the ambassador of the defendant, the United States Department suggested that the defendant was not entitled to sovereign immunity in this action. The conclusion of the State Department was based on the authority of its so-called "Tate Letter" in which it suggested that a sovereign is immune with regard to its public acts but not with respect to private acts. The defendant's contention that the courts have granted immunity with regard to acts of a sovereign which were commercial in nature was well taken. The Court is not unaware that the opinion letter of the State Department is not binding upon it. However the Court saw no reason not to follow the rationale of the "Tate Letter," the applicability of which was clearly suggested by the Secretary of State.

In view of the clear declaration by the ambassador of the defendant that the account was used for governmental purposes of the Republic of Guinea and in view of the fact that the plaintiff offered no evidence to support its conclusory statement that the account was used in the operation of the defendant's pavilion on the 1964-65 World's Fair, the application was granted.

## 57. Rahimtoola v. H. E. H. the Nizam of Hyderabad and others

(1957) 3 All E. R. 441; (1958) A. C. 379.

(State Immunity)

was a dispute with regard to a debt of £ 1,007,940 odd originally standing in the name of the Nizam of Hyderabad in a London bank.

In September 1948, when Indian troops were obliged to enter Hyderabad with a view to suppressing lawlessness there, that amount was standing to the credit of the account of the government of the Nizam of Hyderabad with the respondent bank in London. Parties with ostensible authority to deal with the fund had it transferred to Rahimtoola, then holding the office of the High Commissioner in London for the State of Pakistan. The Bank in accordance with the instructions transferred the money to the credit of an account entitled "To Habib Ibrahim Rahimtoola" (High Commissioner for Pakistan in London.' The Nizam brought an action in July 1954 to recover the money claiming that the money was held in trust and that the parties had no authority to effect the transfer. The State of Pakistan impleaded its sovereign immunity, claiming legal title to the debt. The Chancery Division upheld the contention of Pakistan, but this finding was reversed by the Court of Appeal. The House of Lords reversed the order of the Court of Appeal and allowed the appeal and held:

- (1) that the State of Pakistan could sue the Bank to recover the sum, either in the agent's name, or in its own, adding him as defendant. This their Lordships regarded as sufficient right or interest to bring the rule of immunity into play. Rahimtoola was thus entitled to immunity:
- 2) that as to Rahimtoola, the writ and all subsequent proceedings should be set aside because the legal title to the debt of £ 1,007, 940 odd had vested in him as agent of a sovereign State of Pakistan which was entitled to refuse to have the title to its agent investigated by the Court;
- (3) that the action against the bank should be stayed, since to recover from the bank the / 1,007,940 odd to which the State of Pakistan was nominally entitled, would interfere with the legal rights of that sovereign State of Pakistan;
- (4) that the principle of agency laid down in Buller v. Harrison [(1777)2 Cowp. 565] whereby, under certain circumstances involving mistake of fact, a payer may reclaim payment prior to its transfer from an agent to his principal, had no application where the principal was a sovereign State; and
- (5 that the doctrine that an English court would not stay its administration of an English trust in which a foreign sovereign claimed a beneficial interest was not applicable when the alleged trustee was a foreign sovereign State.

Holding that the English Courts would not in like circumstances entertain an action against their own Government or its agent, they observed that they should not entertain an action against the State of Pakistan or its agent. Agreeing with the observations of Upjohn, J. in (1956) 3 All E. R. at p. 320 that "the present transaction was an inter-governmental transaction: let it be solved by inter-governmental negotiations", the House of Lords held that that was the kernel of the matter. Accordingly the appeal was allowed.

[Lord Denning in a separate julgment however observed that sovereign immunity should not depend on technical rules in domestic law or on whether a foreign government is impleaded, directly, or indirectly, but rather on the nature of the dispute. If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country; but if the dispute concerns, for instance, the commercial transactions of a fereign government and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.]

Comments.—It will appear from the principles laid down in the above case that their Lordships emphasised the right of the Government of Pakistan to sue the bank direct. But, apart from the question of immunity, the bank could set up the Nizam's claim by way of defence and thus avoid the risk of having to pay twice by interpleading the Nizam. Their Lordships, however, considered the agent as having a present legal title, a person in possession.

58. Rex v. Kent [57 T. L. R. 307 : (1941) I. K. B. 454]

(Diplomatic Privilege)

Kent was a code clerk in the U. S. embassy in London having been appointed as such in 1939. He was dismissed by the U.S. Government for stealing two documents as also for obtaining certain documents contrary to the Official Secrets Act. The U. S. ambassador, with the approval of his Government, waived all rights of the dismissed clerk's diplomatic privilege. Kent was convicted to seven years' penal servitud: by the criminal court. He pleaded diplomatic privilege. The question that fell for consideration was whether he could be tried for an offence committed while he acted as a member of the diplomatic staff.

The Court observed that the privilege claimed by the appellant was derived from, and in law was the privilege of, the ambassador and ultimately of the State which sent the ambas-ador. This was not a privilege of the person but of the State which he represented. It was held that an official after dismissal and waiver of diplomatic privilege by the ambassador of his country could not continue to claim the protection of the privilege. The privilege being that of the ambassader and not of the individual, it ceased from the moment of waiver. The extension of the immunity for a reasonable period after the cesser of office usually granted to diplomatic agents does not apply to a case where the agent has been dismissed and the immunity waived by the ambassador. The appellant was also held to be guilty of larceny for having stolen the two copies of documents.

Stolen the two copies of documents.

DISTRICT COURT, NEW YORK

DISTRICT COURT, NEW YORK

59. Bergman v. De Sieyes

(1946) 71 F. SUPP. 334.

(Diplomatic Privilege)

De Sieyes, the defendant, was the French Minister to Bolivia. He was served with civil process by Bergman, the plaintiff, while the former was passing through New York on his way from France to Bolivia. The defendant pleaded his immunity.

It was held (1) that a foreign minister was immune from the jurisdiction, both criminal and civil, of the courts in the country to which he was accredited, on the ground that he was the representative, the alter ego, of his sovereign who was entitled to such immunity and that subjection to the jurisdiction of the courts would interfere with the performance of his duties as such minister; and (2) that a foreign minister en route, either to or from his post in another country, was entitled to innocent passage through a third country and was also entitled to the same immunity from the jurisdiction of the courts of the third country that he would have if he were resident 'therein.

The plaintiff's motion accordingly failed.

## 60. The Amazone

[(1940)P. 40]

(Diplomatic Privilege and Territorial Jurisdiction)

The dispute in this case related to the yacht Amazone between the husband and wife, the husband being the Belgian Assistant Military Attache in London. The wife claimed that the yacht had been purchased with her money and the husband dealt with it as her agent. The wife applied for a writ in rem for possession against her husband who pleaded that he was immune from the jurisdiction of the Court. The writ was refused.

In the Court of Appeal Slesser, J. held that the privilege of embassy is recognised by the common law of England as forming part of International Law, and according to the law it was clear that all persons associated in the performance of the duties of the embassy were privileged, and that an attache was within that privilege.

### 61. U. S. Ex. Rel. Casanova v. Fitzpatrick

(214 F. Supp. 425, Southern District, N. Y., Jan 16, 1963)

Status of member of U. N. Mission charged with conspiracy to commit sabotage

The petitioner, who was a resident member of Cub's Permanent Mission to the United Nations, was charged with conspiracy to commit sabotage and violation of the Foreign Agents Registration Act. His detention was challenged on a writ of habeas corpus on the ground that he was entitled to diplomatic immunity under the U. N. Charter, the Headquarters Agreement and International Law.

The Court while repelling the objection dismissed the writ of habeas corpus. It held that Article 105 of the U. N. Charter (according the representatives of member States privileges and immunities necessary for the independent exercise of their functions in connection with the Organization) did not purport to, nor did it, confer diplomatic immunity upon those representatives; and even if the article is self-executing with respect to the functional activities of U. N. representatives, a conspiracy to commit sabotage against the United States was not a function of any U. N. mission or representative. The Government of the United States did not, by the issuance of a non-immigrant visa (of the classification applicable to the staff of U. N. representatives) and a landing permit, give its agreement that the petitioner, on his entry into the United States to assume his duties as a member of the Cuban Mission, was thereby entitled to diplomatic immunity under the Headquarters Agreement. The petitioner's position not being analogous to that of a diplomat, International Law did not apply to his case. International Law is applicable in the case only to define the nature and scope of diplomatic immunity, once it be found that the petitioner was entitled thereto under the applicable agreement.

American Journal of International Law, Vol. 57, No. 4 (1963), p. 920.

### INTERNATIONAL COURT OF JUSTICE

# 62. In Re. Anglo-Iranian dispute over the Nationalisation of Iran's Oil Industry

(DECIDED ON JULY 5, 1954)

(Jurisdiction of International Court of Justice in re. Interim Measures)

Iran is one of the great oil-producing countries of the world. The Anglo-Iranian Oil Company, a concern in which the British Government held a substantial interest, worked the extensive South Iranian oil-fields with an increasing production, On May 1, 1951, the Iranian Majlis passed a law nationalising its oil industry. Britain, along with the Anglo-Iranian Oil Company, applied to the International Court of Justice for provisional steps to be taken to preserve their rights in Iran until a decision was reached on the merits. In the meantime Iran ordered seizure of the Anglo-Iranian oil installations by virtue of the decree issued by it on June 20, 1951. The International Court of Justice on July 5, 1951, viving its ruling on Britain's application upheld the British Government's plea for a 'freeze' in the Iranian oil dispute. Ten of the 12 Judges who heard the British plea said that arrangements which existed before the law of nationalisation of the Iranian oil Industry was passed, should continue during the interim period, pending final decision by the Court on the principal issue. Two of the Judges gave dissenting opinion and observed that however justified the interim measures of protection might appear they were of the view that the Court should not have indicated them on grounds of principle because if Iran did not accept the jurisdiction of the Court, the Court would be compelled to hold itself without jurisdiction in this case. The World Court, which might 'indicate" but not order, held by a majority that it had jurisdiction in the case.

The Court by a majority opined that both Governments in the dispute should refrain from any meaure which would prevent the flow of oil on the same basis as before May I when Persia passed the nationalisation law.

The Court recommended both Britain and Iran to appoint a Joint Commission to keep the oil moving and supervise expenditure.

July 8, 1951, on the ground that the Court had no jurisdiction over the matter.

The decision of the Court was criticised as usurping a jurisdiction which never belonged to it. The order, it was contended, amounted to a virtual injunction by the Court against a sovereign State directing that State to adjust its internal affairs according to the dictates of the Court. And the Court had no power to pass an interim injunction since it could not permanently prohibit the Government of Iran from nationalising its industry.

The Iranian Government stated that the judgment amounted to an intervention in the internal affairs of Iran and that they considered the judgment as null and void. The defiance of the order of the International Court by Iran did not add to the prestige and authority of the Internaltional Court. The decision of the International Court depends for its enforcement on the willingness of sovereign States to abide by it. And it is submitted that the view of the minority was the sounder one when the two dissenting learned Judges observed that if Iran did not accept the jurisdiction of the Court, the Court would be compelled to hold itself without jurisdiction in the case and that in these circumstances interim measures of protection should not have been indicated.

The Anglo-Iranian oil dispute was referred to the Security Council, which adjourned its discussion on the 19th October, 1951, until the International Court of Justice had ruled whether it was within the Court's jurisdiction.

The International Court of Justice finally on July 22, 1952, ruled that it was not competent to deal with the Anglo-Persian oil dispute and rejected Britain's claim that it was competent to deal with her complaint against Persia's nationalisation of the British owned oil industry. The Court by nine votes to five decided that it could not consider the British charge that Persia violated International I aw in nationalising the Anglo-Iranian Oil Company's 500 million pound sterling Persian properties.

### 63. Monetary Gold Case.

- Case concerning the application of the Convention of 1902 governing the guardianship of infants.
  - 65. Case of the Norwegian Loans issued in France.

66. Admission of a State to Membership in the United Nations.

- 67. Competence of the General Assembly for Admission of a State to the United Nations.
  - 68. Reparation for Injuries Suffered in the Service of the United Nations.

[For a discussion of these cases please see Chapter XXXIX "The International Court of Justice" at pp. 489-492.]

### INTERNATIONAL COURT OF JUSTICE

69. International Status of South-West Africa (July 11, 1950)

[I. C. J. Reports 1950, p. 79]

(Mandated Territory)

[For a discussion of this case please see Chapter VIII on "States in General", at pp. 98 & 99.]

### INTERNATIONAL COURT OF JUSTICE

- Voting Procedure on Questions relating to Reports and Petitions concerning the Territories of South-West Africa.
- 71. Admissibility of Hearings of Petitioners by the Committee on South-West Africa

[For a discussion of these cases please refer to Chap. XXXIX at pp. 493 & 494.]

### INTERNATIONAL COURT OF JUSTICE

#### 72. Case filed by Ethiopia and Liberia against South Africa for declaration re. mandate over South-West Africa

[For a discussion of this case, please see Chap. XXXII at p. 391].

### 73. Naulilaa Incident

[(1928) 2 Reports of International Arbitral Awards, pp. 1012, 1019]

Portugal-Germany, Arbitral Decision of July 31, 1928, concerning responsibility of Germany for damages caused in the Portuguese Colonies of South Africa.

(Reprisals)

The reference to arbitration arose out of the dispute between Portugal and Germany regarding the destruction by German forces in October 1914, while Portugal was still neutral, of the Fort of Cuangar and the posts of Bunga, Sambio, Dirico, and Mucusso in the Portuguese colony in Angola, as a reprisal of the murder of Dr. Schultze-Jena and two of his companions in the port of Naulilaa in the same year.

The German contentions were that the destruction or the capture of the Schultze-Iena mission at Naulilaa constituted an act contrary to International Law, an act giving to the Government of South-West Africa a just motive for exercising reprisals; that the death of Dr. Schultze-Jena and his companions justified the attack on the fort of Guangar; and that in consequence the acts committed by the German troops on different points of the frontier of Angola did not engage the responsibility of Germany.

Award.—The arbitrators held that Germany owed reparation to Portugal for the damage caused at Naulilaa.

The original cause of the deplorable incident at the Naulilaa fort lay in an initial misunderstanding, due to the fact that the parties did not understand each other and that the interpreter was incompetent. It was continued by an error followed by an imprudence on the part of Dr. Schultze-Jena, the leader of the German mission. A neutral State has the right to disarm and internate belligerents under arms who penetrate its territory: Cf. Hague Convention V, 1907, Art. 11. The internment of the interpreter Jensen and the soldier Kimmel was then, in principle, authorised by positive International Law. The German authorities could not, on the contrary, see in this internment, or in its maintenance, an act contrary to International Law, giving them a proper justifiction for resorting to reprisals.

As regards the expulsion of the German consul, which took place after the German attacks, the Tribunal observed that the expulsion of a consular agent, of whom a State has cause of complaint, might constitute an 'unfriendly' act, giving rise to diplomatic representations, but it cannot, when done in the exercise of the sovereignty of a neutral State, constitute an act contrary to International Law justifying, under the title of reprisals, an attack accompanied by all the rigours of war.

The first condition, in fact the sine qua non, of a resort to reprisals is the existence of a previous act contrary to International Law. This condition, the necessity of which is recognised in the German case, is lacking; this, in itself, is sufficient to defeat the plea invoked by the German Government.

Even if the arbitrators accepted the accusation that Portuguese authorities had committed an act contrary to International Law, justifying, in principle, reprisals, the German contention would nevertheless be rejected for two other reasons, each of which is decisive:

- (1) Reprisals are not licit (legitimate) except when they have been preceded by a request for redress (sommation) which has been unavailing. Employment of force is not justified in effect, except by its character of necessity. It is impossible to consider as a demand from State to State the communication by the authorities of the offending State to each other of the news of the pretended offence. There was, therefore, on the part of the authorities of South-West Africa recourse to force without previous attempt to obtain satisfaction by legal means—which constitutes a further reason for denying the legitimacy of the reprisals resorted to.
- (2) The necessity of a proportonality between the reprisal and the offence appears to be recognized in the German reply. Even if one admits that International Law does not require that reprisals be measured approximately by the offence, one must certainly consider as excessive, and consequently illicit, reprisals out of all proportion to the act which has motivated them. In the present case there was an evident disproportion between the incident of Naulilaa and the six acts of reprisal which have followed it.

The arbitrators thus arrive at the conclusion that the German acts of aggression in October, November and December 1914, on the Angola frontier cannot be considered as legitin ate reprisals for the Naulilaa incident or for the subsequent acts of the Portuguese authorities, there being no prior attempt to achieve redress and no proportionate relation between the alleged offence and the reprisals resorted to.

For these reasons, Germany must make reparation for the damage caused by the aggressions.

[It will appear from the Tribunal's award that the first indispensable condition for, or the sine qua non of, a resort to reprisals is the existence of a previous act of a State which is contrary to International Law; and reprisals are only legitimate when they have been preceded by an unsuccessful demand for r. dress which has proved unavailing as the employment of force may only be justified by necessity. The second condition is that the reprisals taken must be commensurate with the alleged offence, and reprisals out of all proportion to the act that inspired them ought certainly to be considered as excessive and illegal.

With the establishment of the United Nations and the acceptance by members of principles and the institution of methods that armed force shall not be used, save in the common interest, and the obligations imposed by the Charter to settle disputes by peaceful means and to refrain in international relations from the threat or use of force, the whole institution of reprisals has become incongruous and irreconcilable.]

#### HOUSE OF LORDS

### 74. Janson v. Driefontein Consolidated Mines, Ltd.

(1902) A. C. 484

(Threatened War and Commencement of Hostilities)

The respondent company who were the original plaintiffs, were a mining company registered under the laws of the South African Republic having their head office at Johannesburg in Transvaal and also a London office. In August

1899 the company insured with the appellant and other underwriters a parcel of gold during its transit from the gold mines near Johannesburg to the United Kingdom against "arrests, restraints, and detainments of all kings, princes and peoples." On the 2nd of October, 1899, the gold in question was seized in transit by the Government of the South African Republic. On the date of the seizure of the gold, i. e., the 2nd of October, 1899, war was admitted to be imminent; and on the 11th of October, 1899, at 5 p. m. war in fact broke out between Great Britain and the Republic.

The company brought an action upon the policy before the termination of the war, the defendant having agreed not to set up the plea of alien enemy, which would otherwise have debarred the company from suing in a British court during the war. The action succeeded, and the decision was affirmed by the Court of Appeal and finally by the House of Lords. The House of Lords held that inasmuch as the insurance had been effected and the loss incurred before the actual outbreak of war, the respondent were entitled to recover; and this even though the loss was incurred by a scizure made in contemplation of war, and in order to use the gold in support of the war.

Earl of Halsbury, L. C .- The principles upon which commercial intercourse must cease between nations at war with each other can only be where the heads of the State have created the state of war ....... In order to produce the effect, either nationally or municipally, it must be a war between the two nations. No contract or other transaction with a native of the country which afterwards goes to war is affected by the war. The remedy is indeed suspended; an alien enemy cannot sue in Courts of either country while the war lasts; but the rights on the contract are unaffected, and when the war is over the remedy in the Courts of etiher is restored ....... It would be, to my mind, to introduce a new principle into our law to hold that the probability of a war should have the same operation as war itself. It is war and war alone that makes trading illegal ..... I think the appeal should be dismissed.

Lord Macnaghten.-The law recognises a state of peace and a state of war, but it knows nothing of an intermediate state which is neither the one thing nor the other-neither peace nor war... However critical may be the condition of affairs, however imminent war may be, if and so long as the Government of the State abstains from declaring war or accepting a hostile challenge there is peace-peace with all attendant consequences-for all its

subjects.

The result, therefore, in the present case is that, however hostile the intentions of the South African Republic may have been at the moment when this gold was seized, the seizure must be treated as a seizure in time of peace between the Republic and this country. The event which happened was within the terms of the policy and there is no ground on which the underwriter can dispute their liability.

Lord Lindley .- Threatened war or anticipated war or imminent war is peace, which may not after all result in war; and to apply the rules of war to insurances against loss before war breaks out would paralyse commerce, and often without any real necessity... In my opinion the order and judgment appealed from should be affirmed.

Notes.-This case decides that the legal effects of war on commercial relations will accrue only as from the commencement of hostilities. Where therefore the insurance is legal in its inception and the loss occurs before war, an action on the policy may be successfully brought even during war if the underwriter does not put on the record a special dilatory plea of the

continuance of hostilities. But beyond laying down the above principle, the decision reaffirms the general rule of non-intercourse. "The rule of non-intercourse came under consideration in the same war in the case of The Mashona (10 C. T. L. R. 450) where, amongst other things, it was laid down that one of the immediate consequences of the outbreak of hostilities was the interdiction of all commercial intercourse between the subjects of the States at war without the licence of their respective Governments, and that this prohibition applied to all persons domiciled within the belligerent States. In other words, all commercial intercourse without licence between persons, divided by the line of war, i. e., domiciled in the countries of the respective billigerents, is prohibited. With respect to existing transactions and relations the primary rule—which applies to all cases not excluded on some special ground—is that they are suspended during the war both as to their legal effects and, in strict law, as to all rights of suit thereon, but revive on the restoration of peace."]

#### Daimler Co. Ltd. v. Continental Tyre and Rubber Co., (Great Britain), Ltd.

(1916) 2 A. C. 307

(Enemy Character)

[For a discussion of this case please see Chapter XLII "Enemy Character", at p. 532]

In the Supreme Court of India
[Appral by Special Leave from the judgment and order dated the 7th
August, 1967, of the Judicial Commissioner's Court, Goa, Daman
and Diu in Criminal Revision]

76. Rev. Mons. Sebastiao Fransisco Xavier dos Remedios Monteiro

... Appellant

The State of Goa

...Respondent

[26th March, 1969] [A. I. R. 1970 S. C. 329]

[Belligerent Occupation, Annexation and Deportation] The following judgment of the Court was delivered by:

Hidayatullah, C. J.—The appellant (Rev. Father Monteiro) was a resident of Goa. After the annexation of Goa by India, he had the choice of becoming an Indian national or retaining Portuguese nationality. He chose the latter and was registered as a foreigner. He also obtained a temporary residential permit which allowed him to stay on in India till November 13, 1964. The period of stay expired and he did not ask for its extension or renewal. He was ordered to leave India by the Lt. Governor of Goa. The Lt. Governor was empowered by a notification of the President of India issued under Art. 239 of the Constitution to discharge the functions of the Central Government and his order had the same force and validity as if made by the Central Government. Rev. Father Monteiro disobeyed the order, and in consequence was prosecuted under S. 14 read with S. 3 (2) (c) of the Foreigners Act. He was convicted and sentenced to 30 days' simple imprisonment and a fine of Rs. 50. He appealed unsuccessfully to the Court of Session and his revision application to the Commissioner,

Goa, also failed. He now appeals by special leave of this Court against the order of the Judicial Commissioner. Goa, dated August 7, 1967.

The defence of Rev. Father Monteiro was that he was protected by the Geneva Conventions Act, 1960, that the order of the Lt. Governor for his deportation was ultra vires the Act and that he had committed no offence. The Judicial Commissioner and the two courts below held, for different reasons, that the Geneva Conventions ceased to apply after Goa became a part of India and that the Municipal Courts in India could give him no redress against an Act of State. In the appeal before their lordships of the Supreme Court, Mr. Edward Gardner Q. C. appeared for Rev. Father Monteiro with the leave of this Court.

Goa was a Portuguese colony for about 450 years, having been seized by force of arms. On December 19, 1961, Goa was occupied by the Indian Armed Forces following a short military action. It then came under Indian Administration from December 20, 1961, and was governed under the Goa Daman and Diu (Administration) Ordinance, 1962, promulgated by the President of India. Under the Ordinance, all authorities were to continue performing their functions and all laws were to continue in force and power was conferred on the Central Government to extend to Goa other laws in force in India. The Ordinance was later replaced by an Act of Parliament bearing the same title and numbered as Act I of 1962. On March 27, 1962, the Constitution (Twelfth Amendment) Act, 1962, was enacted and was deemed to have come into force on December 20, 1961. By this amendment Goa was included in Union Territories and a reference to Goa was inserted in Art, 240 of the Constitution. The Central Government also promulgated under s. 7 of the Citizenship Act, 1955, the Goa, Daman and Diu (Citizenship) Order, 1962, and as it directly concerns the present matter we may reproduce the second paragraph of the Order here:

"2. Every person who or either of whose parents or any of whose grand-parents was born before twentieth day of December, 1961, in the territories now comprised in the Union Territory of Goa, Daman and Diu shall be deemed to have become a citizen of India on that day: Provided that any such person shall not be deemed to have become a citizen of India as aforesaid if within one month from the date of publication of this Order in the Official Gazette that person makes a declaration in writing to the Administrator of Goa, Daman and Diu or any other authority specified by him in this behalf that he chooses to retain the citizenship or nationality which he had immediately before the twentieth day of December, 1961."

Pursuant to this Order, on April 27, 1962, Rev. Father Monteiro made his declaration of Portuguese nationality and on August 14, 1964, applied for a residental permit. On his failure to apply for a renewal of the permit the order of the Lt. Governor was passed on June 19, 1965. Prosecution followed the disobedience of the order.

At the outset it may be stated that Mr. Gardner concedes, that he does not question the legality of the military action or the annexation. In fact, he is quite clear that we may consider the annexation to be legal. His contention, in brief, is that the order of the Lt. Governor is tantamount to deportation of Rev. Father Monteiro and the Geneva Conventions Act gives protection against such deportation during occupation which has not validly come to an end, and, therefore, no offence was committed by him.

The argument overlooks one cardinal principle of International Law and it is this. Rev. Father Monteiro by his declaration retained his Portuguese nationality. His sojourn in India was subject to such laws as existed in India in general and in Goa in particular. It cannot be doubted that the reception and residence of an alien is a matter of discretion and every State has, by reason of its own territorial supremacy, not only the legal right but also the competence to exclude aliens from the whole or any part of its territory. This proposition is so well-grounded in International Law that every country has adopted the passport system, which document certifies nationality and entry into any State is only possible with the concurrence of that State. Again a State exercises territorial supermacy over persons in its territory, whether its own subjects or aliens, and can make laws for regulating the entry, residence and eviction of aliens. Therefore, the application of the Foreigners Act, the Registration of Foreigners Act and the Orders passed under them, to Rev. Father Monteiro was legally competent.

This proposition being settled, Mr. Gardner sought support for his plea from the provisions of the Geneva Conventions Act of 1960. That Act was passed to enable effect to be given to the International Conventions done at Geneva in 1949. Both India and Portugal have signed and ratified the Conventions.

We now come to Arts. 47 and 49 which are the crux of the matter :

- "47. Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or Government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."
- "49. Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive......"
- Mr. Gardner's submissions are: the order that has been made is a deportation order and it is therefore ultra vires the Geneva Conventions. These Conventions create individual rights which cannot even be waived. So long as occupation continues these rights are available and the Geneva Conventions must not be looked at in isolation but read in conjunction with International Law as part of the positive law. They should not be abondoned lightly. According to him, conquest was a method of acquiring territory in the past but after the Covenant of the League of Nations, the Charter of the United Nations and the General Treaty for the Renunciation of War, the acquisition of territory in International Law by the use of force does not confer any title. Occupation, therefore, can only be of terra nullius, not now possible.

The contention on behalf of the State is that by occupation is meant occupation by armed forces of belligerent occupation and occupation comes to an end by conquest followed by subjugation. Reference is made to many works on International Law. We have to decide between these two submissions.

We are of opinion that the pleas of Mr. Gardner that the Geneva

Conventions Act makes dispunishable the conduct of Rev. Father Monteiro must fail.

To begin with, the Geneva Conventions Act gives no specific right to any one to appr ach the Court. It will be seen that the Act by itself does not give any special remedy. It does give indirect protection by providing for breaches of the Convention. The Conventions are not made enforceable by Government against itself nor does the Act give a cause of action to any party for the enforcement of the Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population but there is no right created in favour of protected persons which the Court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless and the court may have to leave the matter to what Westlake aptly described as indignation of mankind.

The appellant has, however, sought the aid of the Geneva Conventions to establish that he could not be compelled to leave Goa and thus committed no offence.

The definition of 'occupation' in the Regulations shows that a territory is considered as occupied when it finds itself in fact placed under the authority of a hostile army. This means that occupation is by military authorities. In the Justice case it was stated that the laws of belligerent occupation apply only to an occupation during the course of actual warfare and that once the enemy has been totally defeated those laws do not apply to the

ensuing occupation.

The question thus resolves itself into this: Is occupation in Art, 47 belligerent occupation or occupation which continues after the total defeat of the enemy? In this connection courts must take the Facts of State from the declaration of State authorities. Military occupation is temporary de facto situation which does not deprive the Occupi d Power of its sovereignty nor does it take away its statemood. All that happens is that pro tempore the Occupied Power cannot exercise its rights. In other words, belligerent occupation means that the Government cannot function and authority is exercised by the occupying force.

Annexation, on the other hand, occurs when the Occupying Power acquires and makes the occupied territory as its own. Annexation gives a de jure right to administer the territory. Annexation means that there is not only possession but uncontested sovereignty over the territory. As Greenspan2 put it military occupation must be distinguished from subjugation, where a

territory is not only conquered, but annexed by the conqueror.

There is, however, a difference between the annexation on the one hand and premature annexation, or as it is sometimes called 'anticipate annexation, on the other. Jurists regard annexation as premature so long as hostilities are continuing and there is an opposing army in the field even if the Occupied Power is wholly excluded from the territory.

Anticipated annexation by unilateral action is not true annexation True annexation is only so when the territory is conquered and subjugated.

The Conventions rightly lay down that annexation has no effect on the protection. But they speak of pre ature or anticipated annexation. Premature or anticipated annexation has no effect. Such a plea was negatived for the same reason by the Nuremberg Tribunal. In fact, when the Convention

2. The Modern Law of Land Warfare, p. 215.

88 The Land warfare.

United States v. Attstoctcer et al. (1947) U. S. Military Tribunal, Nuremberg L. R.
 T. N. C. vi 34.

itself was being drafted the experts were half-inclined to add the word 'alleged' before 'annexation' in Art. 47 to distinguish between annexation following conquest and subjugation and annexation made while hostilities are going on. Subjugation puts and end to the state of war and destroys the source of authority of the existing Government. In subjugation, which is recognised as one of the modes of acquiring title, not only the de facto but also the de jure title passes to the conqueror. After subjugation the inhabitants must obey the laws such as are made and not resist them.

Thus the principle which is accepted is that the Occupying Power must apply the Convention even when it claims during conflict to have annexed the occupied territory. However, when the conflict is over and there is no hostile army in the field, annexation has the effect of creating a title to the territory.

In the present case the facts are that the military engagement was only a few hours' duration and then there was no resistance at all. True annexation followed here so close upon military occupation as to leave no real hiatus. We can only take the critical date of true and final annexation as December 20, 1961, when the entire government and administration were taken over and there was no army in occupation and no army in opposition. The occupation on December 20, 1961, was neither belligerent occupation nor anticipated occupation, but true annexation by conquest and subjugation. It must be remembered that Mr. Gardner concedes that the annexation was lawful. Therefore since occupation in the sense used in Art. 47 had ceased, the protection must cease also. We are, therefore, of opinion that in the present case there was no breach of the Geneva Conventions.

The Geneva Convention ceased to apply after December 20, 1961. The Indian Government offered Rev. Father Monteiro Indian nationality and citizenship which he refused and retained his Portuguese nationality. As a Portuguese rational he could only stay in India on taking out a permit. He was, therefore, rightly prosecuted under the law applicable to him. Since no complaint is made about the trial as such, the appeal must fail. It will be dismissed.

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL 77. The Zamora Zamora [(1916) 2 A. C. 77]

(Prize Court, International Law and Municipal Law, Neutrality, Blockade, etc.)

The Zomora was a Swedish vessel carrying a cargo of copper and grain from New York to Stockholm. She was stopped by a British cruiser on April 8, 1915, and was taken to a British port. A writ was issued by the Procurator General on April 19, claiming confiscation of the ship and the cargo on the ground that more than one-half of the cargo was contraband. A summons was subsequently taken out by the Procurator-General requisitioning the copper pending adjudication by Prize Court, under Order XXIX, r, 1, of the Prize Court Rules, 1914, who gave an undertaking for payment into Court on behalf of the Crown of the appraised value of the cargo.

The owners of the ship filed objections. Sir Samuel Evans, President of the Probate, Divorce and Admiralty Division, ordered the requisition, overruling the objection of the owners of the carge. The Judicial Committee reversed the decision.

The questions that fell for determination in the case were: (1) whether an order of confiscation was binding on the Prize Court; and (2) whether, under the principles of International Law, the Crown has a right to requisition the vessels or goods in the custody of the Prize Court pending the decision of the Court as to their condemnation or release.

Lord Parker gave a monumental judgment, which is the bedrock of the entire case law with regard to Prize Court, relation of International Law to the English Municipal Law, the scope of the Order-in-Council in relation to Acts of Parliament, the right to requisition cargo and vessels, blockade, etc.

It was observed that the Prize Court Rules derive their force from Orders of His Majesty-in-Council. The Prize Court Rules so far as they relate to procedure and practice have statutory force and are, undoubtedly, binding.

It was further observed that the King-in-Council or indeed any branch of the Executive had no power to prescribe or alter the law to be administered by Courts of law in this country, unless the Order-in Council purported to mitigate the rigour of International Law or the Crown rights in favour of the neutral or the enemy.

All matters upon which the Court is authorised to proceed arise out of acts done by the sovereign power in right of war, and the King, directly or indirectly, is a party to all proceedings in a Court of Prize. A Prize Court must, of course, deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

It was pointed out that the law which the Prize Court is to administer, is not the national or the municipal law, but the law of nations-International Law. Of course, the Prize Court is a municipal court, and its decrees and orders owe their validity to municipal law. The law it enforces may, therefore, in one sense, be considered a branch of municipal law. Nevertheless, the distinction between municipal and International Law is well defined. A Court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign State which calls it imo being. It need inquire only what that law is, but a Court which administers International Law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilized nations in their relations towards each other or in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to Orders of the King-in-Council purporting to prescribe or alter the International Law, it is administering not international but municipal law.; for an exercise of the prerogative cannot impose legal obligation on any one outside the King's dominions who is not the King's subject. If an Order-in-Council were binding on the Prize Court, such Court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction.

It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is nonetheless true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering

International Law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. Even if the provisions of the Act were merely declaratory of the International Law, the authority of the Court as an interpreter of the law of nations would be thereby materially weakened for no one could say whether its decisions were based on a due consideration of international obligations, or on the binding nature of the Act itself. The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the executive orders of the King-in-Council.

It does not follow that, because Orders-in-Council cannot prescribe or alter the law to be administered by the Prize Court, such Court will ignore them entirely. On the contrary, it will act on them in every case in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral as the case may be. Further, the Prize Court will take judicial notice of every Order-in-Council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such Order short of treating it as an authoritative and binding declaration of law.

The primary duty of the Prize Court is to preserve the res for delivery to the persons who ultimately establish their title. The inherent power of the Court as to sale or realisation is confined to cases where this cannot be done either because the res is perishable in its nature, or because there is some other circumstance which renders its preservation impossible or difficult.

With regard to the right of requisition by the Crown of ships and goods of neutrals in the custody of the Prize Court, their Lordships observed that a belligerent power has by International Law the right to requisition vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.

Their Lordships concluded that the order appealed from was wrong not because, as contended by the appellants, there is by International Law no right at all to requisition ships or goods in the custody of the Court, but because the Judge had before him no satisfactory evidence that such a right was exercisable.

THE INTERNATIONAL MILITARY TRIBUNAL NUREMBERG

78. The Nuremberg Judgment (1946)

CMD, 6964 (1946)

(War Crimes)

[For a discussion of this case please see Chapter XI.VIII on "War Crimes" at pp. 566-571.]

79. The Tokyo Trial

[For a discussion of this case please see Chapter XLVIII on "War Crimes" at pp. 571-573.]

#### 80. United States v. Valentine

(288 F. Supp. 957)

U. S. Dis. Ct., Puerto Rico, August 20, 1968

(Liability to military service)

Eleven citizens of Puerto Rico, who were prosecuted for refusing to be inducted into the United States armed forces in violation of 50 U.S. C. App. and Selective Service Regulations, moved for dismissal of the indictments on the ground that they would be liable to military service only if the Court determined that United States military activity in Viet-nam did not violate international law and American treaty commitments. Judge Cancio repelled the argument, observing that the defendants lacked standing to raise it in view of the fact that they were not under indictment for refusing to go to Vietnam. The principle of separation of powers precluded judicial inquiry into the conduct of United States foreign or military policy. No treaty can authorize the judiciary to undertake an inquiry forbidden to it by the Constitution. Nor would the Court or the jury be authorized to undertake such an inquiry on the basis of the defendants' contention that they would have risked criminal liability under the Charter of the International Military Tribunal and the Nuremberg judgments arising therefrom had they permitted themselves to be inducted. Mere membership in the armed forces could not under any circumstances create criminal liability.

### 81. The Scuttled U-boats (War Crime)



1946) I Law Reports of Trials of War Criminals

(Termination of War-War Crimes)

The German High Command in North-West Germany surrendered to the Allies on May 4, 1945, leading to the signing of an armistice. Subsequent to its signing but before coming into effect, the German Naval Command issued orders for the scuttling of the German U-boats. This order was countermanded, but the accused—an instructor to U-boat officers—scuttled two U-boats on May 6. He was arrested and tried on a charge of having committed a war crime contrary to the laws and usages of war.

The defence of the accused was that neither he knew of the contents of the Instrument of Surrender nor of the countermanding of the scuttling order,

The accused was found guilty of the crime charged with and sentenced to imprisonment for seven years, which was subsequently reduced to five years by the confirming officer.

#### 82. The Alabama Claims

(1872) I MOORE, INTERNATIONAL ARBITRATIONS, p. 653.
[Please see Chapter LI on Neutrality, at p. 599]

## 83. The Appam

HUDSON CASES, 1352.

(Neutrality)

The Appam was a British merchant vessel, which was captured by the German cruiser Moewe. She was brought on February 1, 1916, to the port of Norfolk (U. S. A.), although U. S. A. was a neutral country. The United States Government liberated the ship's crew and passengers, interned the prize crew and took libel proceedings against the vessel, inasmuch as her presence in a port of the United States was an act in violation of her neutrality. The District Federal Court of U. S. A. held that the German Government had ceased to have any legal claim upon the British ship as soon as she entered into the neutral waters with intent to stay there indefinitely. On appeal, the Supreme Court confirmed the judgment of the District Federal Court. It was observed that a prize vessel could not be legally brought into neutral waters without a convoy and that the usual course after capture of the Appam would have been to take her to a German port, where a prize court of that nation. might have adjudicated her status and condemned the vessel as prize of war. It was further observed that the vessel was not taken to a German port or to the port of an ally; that she was not taken to America for the purpose of repairs; that she was not driven by the stress of weather, unseaworthiness or shortage of fuel or provisions to seek protection of a neutral State for a short time; and that she was brought into the neutral port without a convoy. In these cicrumstances, the effort of a belligerent to make of an American port a depository of captured vessels with a view to keeping them there indefinitely was a breach of neutrality within the meaning of the provisions of the Hague Convention concerning the rights and duties of neutral powers in naval war.

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

### 84. The Stigstad

(1919) A. C. 279.

(Neutrality : Property in war at sea)

The Stigstad was a Norwegian ship. In 1915 while she was sailing from a Norwegian port Rotterdam she was stopped by a British vessel. She was carrying a cargo of iron-ore briquettes, which was the property of neutrals, but was intended to be carried from Rotterdam to Germany. The cargo was sold and an agreed sum was paid from the proceeds to the appellants as freight. appellants laid claims for detention and special expenses, which were

The case arose out of the 'Reprisals' Order-in-Council of March 11, 1915, which laid down that every merchant vessel sailing after the 1st of March, 1915, on her way to a port other than a German port, carrying goods with an enemy destination or which are enemy property, would be required to discharge the cargo in a British or allied port and placed in the custody of the marshal of the prize court and unless they are contraband of war, shall, if not requisitioned for the use of His Majesty, be restored by order of the Court, upon such terms as the Court may deem just to the person entitled thereto.

Quoting with approval the observations, in the case of the Zamora (1916) 2 A. C. 77, their Lordships observed that where there is just cause for retaliation, neutrals may by the law of nations be required to submit to inconvenience from the act of a belligerent power greater in degree than would be justified had no just cause for retaliation arisen.

Their Lordships observed that the Order-in-Council did not inflict hardship excessive either in kind or degree upon neutral commerce. In fact the neutral commerce under this Order was treated with all practicable tenderness. The neutral ship-owner was paid a proper price for the service rendered by his ship and the neutral cargo-owner a proper price according to the value of his goods. The claim for special damages for wrong done by the mere fact of putting in force the Order-in-Council was disallowed.

## 85. The Altmark (1940) HACKWORTH, DIGEST, VII, 568.

(Neutrality)

At the outbreak of the Second World War between England and France and Germany in September 1939, the Altmark, which was a German auxiliary warship, was on her way from the Gulf of Mexico to Rotterdam with a cargo of oil. The Altmark had on board three hundred British officers and sailors, taken from various British merchant ships that had been sunk by the German poc'et battleship Admiral Graf Spee, as prisoners of war. On February 14, 1940, the Altmark entered Norway's territorial waters with the intention of coasting along the Norwegian and Swedish coasts till she reached a German port. She was given permission to navigate through territorial waters after the Norwegian authorities had ascertained that she was an auxiliary vessel. A British request to search her was refused. On February 16, 1940, the Altmark was attacked by the British destroyer Cossack in Norwegian territorial waters. The latter forced the Altmark into a Norwegian fjord and in spite of the protests of two Norwegian warships, removed the British seamen to England.

The Norwegian Government lodged a strong protest on the violation of her neutrality by the British destroyer Cossack. The British Government replied that the Norwegian Government had failed in its duty to subject the vessel to a careful search and that the presence of prisoners on board the Altmark took the case outside the rule of free passage through territorial waters, it being contended that the passage of the Altmark was illegal, as was the transport of prisoners. It was Norway's duty to release the prisoners or at least order the German vessel to leave the neutral waters.

The Norwegian Government repelling the contention of the British Government observed that the Altmark was a German warship and was as such exempt from search and that Norway's only right was to verify her identity and status from her papers, as was done by the first Norwegian torpedo-boat on the 14th February. It was further observed that there was no rule of International Law which denied to a belligerent the right to transport prisoners through neutral territorial waters if the passage itself was legal. The Altmark did not touch any Norwegian port but was throughout making passage and since neither Hague Convention No. XIII of 1907 nor the Norwegian Neutrality Regulations of 1938 contained any express time-limit for mere passage, there was no obligation on the Altmark to leave territorial waters after 24 hours, and accordingly her passage was itself legal. There was no jurisdiction for the British action in the territorial waters of Norway, inasmuch as Norway had not failed in the discharge of its obligations.

The weight of authority seemed inclined to hold that Norway did observe her neutrality and was not to blame. Article 10 of the XIII Hague Convention of 1907 provided that the neutrality of a power is not affected by the mere passage through its territorial waters of warships or prizes belonging to belligerents. The case of Sitka during the Crimean War further lent support to the above view.

Prof. Edwin Borchard of Yale University rightly observed in dealing with this case that "greatly as one may sympathize with the irresistible temptation of the British destroyer to release the captives of the Altmark, it is not easy to perceive any violation on Norway's part of her neutral duties." He further observed that as a public ship the Aitmark was free from visit and inspection except possibly to verify her in conformity with Norway's neutral-Referring to the Franco-Prussian war, he observed that during that war a French war vessel entered the Firth of Forth with German prisoners on board, whereupon the German Consul at Leith asked Great Britain to release the prisoners in accordance with Britain's alleged neutral duty. The British Government replied that the French warship was privileged to enter and to remain for a limited time, that the prisoners on board did not become free, that while on board they were under French jurisdiction, and that the neutral authorities had no right to interfere with them. Hyde also shares the same view when he observes that Norway lacked the right to search a public belligerent vessel such as the Altmark whose immunity from the local jurisdiction embraced immunity from search.

### 86. The Asama Maru

### (Neutrality)

During the Second World War in January 1940 the Asama Maru, a Japanese merchant vessel, was on her way from an American port Honolulu to the Japanese port of Yokohama and had on board the ship some German divilians. Both Japan and America were neutrals till then. While the Asama Maru was near the Japanese territorial waters, a British cruiser captured the ship and took off 21 German passengers as being liable to military service and being actually on their way home to take up such service. The Tokyo Government took strong objection to the action of the British Government and contended that it was in violation of the principles of International Law. The British Government contended that, since under the German Army Code every German male from the age of 18 years to the age of 45 years must bear arms for his country, the 21 German civilians being of military age were in the position of contraband because they would have to serve in the German Army as soon as they reached Germany. The Japanese Government replied that the principles now advanced by the British Government were contrary to those laid down in the famous case of the Affair of the Trent and in the well known case of the S. S. China. The office and character of the persons detained were not such as to make them contraband for the obvious reason that neutral States had admittedly a right to maintain friendly relations in time of war with both belligerents. It was contended by the Japanese Government that no Government could ever have the right to see beneath the surface and forestall the fate that would be in store for the civilians later on. It was clearly laid down in the case of the S. S. China that only people in the armed forces or auxiliaries detained. The British view received trenchant criticism at the hands of jurists as being contrary to the principles of International Law that were laid down in the Affair of the Trent and the S. S. China.

## 87. The Lena (1904)

(Repairs in a Neutral Country)

During the Russo-Japanese War the Russian cruiser Lena entered the American port of San Francisco in a badly damaged condition. She stood badly in need of repairs to her engines and boilers. Prior to her entering the American port, she had been engaged in cruising against Japanese commerce in the Pacific. The Japanese Government made diplomatic representation to the American Government that repairs of the Lena if carried out would add to the fighting capacity of the vessel. The proceedings were, however simplified by a written request from the commander of the Lena for internment. The vessel was no doubt repaired, but she was kept in custody for the period of the war, her officers and crew were put on parole and they were not allowed to leave the territory of the U.S.A.

### 88. The Washington (1940)

Neutrality : Interception of Mails)

The Government of U. S. A. lodged a protest on January 6, 1940, with the British Government for the latter's interference with the former's mails. It was alleged that Britain had no right to interfere with American mails on American or other neutral ships on the high seas or on ships which involuntarily entered British ports. It might be noted that America till then was a neutral country. The British Government replied that their practice to prevent intelligence reaching the enemy which might assist them in hostile operations was in accord with International Law. Their assurance, however, that innocent mails would not be conscredended the controversy.

### 89. The Caroline (1839)

(MOORE, DEGEST, 11, S. 217

(Doctrine of Setf-defence)

In 1837, during the progress of a rebellion in Canada, the Canadian Government, anticipating an attack by the insurgents, despatched a force across the Niagara river, which went on the American side of the river. The Commander of British forces attacked, on the American side of the Niagara river, a small boat called the Caroline and killed two of its crew. The American Government lodged a strong protest with the British Government and asked the latter "to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation." Great Britain, after a protracted negotiation, finally expressed regret at the incident and apologised for the action.

Lawrence referring to the above case points out that the incident may be held to show that temporary violations of neutral territory resorted to under stress of a great emergency, are but technical offences, to be apologised for on the one hand and condoned on the other, but not regarded as serious wrongs for which substantial reparation is due.

### 90. The Franciska (1855

10 MOO. P. C. 36

(Blockade)

The Franciska was a Danish vessel, which was captured by a British cruiser when she was on her way to Riga, a port blockaded by Britain during the Crimean War against Russia. During the Crimean War various orders were issued by the English, French and Russian Governments, the effect of which was to permit trade to be carried on by their respective subjects in the Baltic ports. These ports were blockaded by the English and French fleets, but the orders had the effect of excluding neutrals from such trade.

It was contended on behalf of the owners of the ship that there was no intention to break the blockade and she was ordered to proceed to Riga only if

there was no blockade.

The Privy Council held that the blockaded place must be watched by a force sufficient to render the egress and ingress dangerous and that the plea of ignorance of the existence of the blockade in the particular case was invalid because the captain of the ship was aware of the blockade when the ship sailed from the last port. Their Lordships of the Judicial Committee, however, held that as the blockade was relaxed in favour of belligerents to the exclusion of neutrals, it was not a legal blockade, and, therefore, the vessel was improperly seized for attempting to enter the port of Riga and must be restored.

### SUPREME COURT OF THE UNITED STATES

### 91. The Peterhoff (1866)

5. WALLACE, 28

(Blockade and Contraband : Continuous Voyage,

The Peterhoff was a British vessel. During the American Civil War (1861-65) she was captured in 1863 by an American cruiser en route to Matamoras (Mexico), a neutral port, from London. It was alleged that she was carrying contraband; that she intended to violate the blockade of the coasts of the Southern Confederacy although the goods apparently were destined for Matamoras and that the real destination was a blockaded port. This doctrine become known as the doctrine of "continuous voyage" or "ultimate destination." It was held by an American court that since the neutral port in question had arisen suddenly from an unimportant place to a very important port of immense trade, the vessel and the cargo be condemned. On appeal to the Supreme Court, the decision was reversed and it was held that the trade between London and Matamoras did not violate the blockade, even though the goods might be transported by inland navigation to the blockaded country. But the Court condemned that part of the cargo which consisted of military article whoses evident destination was the Confederate States, although the vessel itself and its non-contraband cargo were released.

The Supreme Court held that a blockade is not to be extended by construction, and that as the United States authorities had not expressly declared the whole river blockaded, the Mexican side must be considered open to the commerce of neutrals. But with regard to contraband on board the ship Chief Justice Chase observed: "Contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. This latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockad ed or not. The trade of neutral with belligerents in articles not contraband

is absolutely free, unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit at sea. Hence, while articles not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined, in fact, to a State in rebellion, or for the use of the rebel military forces, were liable to capture though primarily destined to

"We are obliged to conclude that the portion of the eargo which we have characterized as contraband must be condemned."

### THE HIGH COURT OF ADMIRALTY

### 92. The Orozembo

(1807) 6 C. ROB. 430

(Unneutral Service)

The Oorzembo was an American ship, which, during the war with Great Britain and Holland in 1807, wrs carrying three senior Dutch military officers and two civil servants to Batavia on the orders of the Government of Holland. In the course of her voyage she was captured by the British. Sir William Scott in delivering the judgment observed that a vessel hired by the enemy for the conveyance of military persons was to be considered as a transport subject to condemnation, has been held by this Court in the Friendship (1807 6 C. Rob. 420. The number of military persons alone was an insignificant circumstance in the considerations on which the principle of law on this subject was built, since fewer persons of high quality and character might be of more importance than a much greater number of persons of lower

As regards the argument that the master was ignorant of the service on which he was engaged, it was observed that proof of delinquency in the master or owner was not necessary and it would be sufficient if there was an injury arising to the belligerent from the employment which the vessel was found. The carrying of military persons to the colony of an enemy who were there to take on them the exercise of their military functions, would lead to condemnation, and that the Court was not to scan with minute arithmetic the number of persons that were so carried.

In the result, the vessel was liable to be considered as a transport, let out in the service of the Government of Holland, and was, as such, subject to condemnation.

### 93. The Affair of the Trent (1862)

(Unneutral Service)

The British mail steamer Trent was stopped on her way from Habana to St. Thomas by an American cruiser in 1861 during the American Civil War. She had, among others, two passengers on board Messrs. Mason and Slidell, who were proceeding as envoys of the Southern Confederacy to Great Britain and France. They were forcibly removed, while the vessel was allowed to continue her voyage. The United States contended that since despatches were clearly contraband, the bearers or couriers who undertook to carry them fell

under the same category. Great Britain repudiated the contention of U. S. A. by observing that the character and office of the persons captured did not make them contraband, inasmuch as they were being sent out as envoys to neutral powers and the seizure was unjustified as a neutral State had absolute right to maintain diplomatic relations with the belligerents. After protracted negotiations the United States released the prisoners.

#### SUPREME COURT OF NEW YORK

94. Curran v. City of New York

(119 Y. L. J. 16: January 2, 1948)

(Immunity of the U. N. from payment of taxes at its headquarters)

Father Curran of New York in his capacity as a taxpayer brought an action in 1947 in a lower New York court against Trygve Lie, Secretary-General of the United Nations, and the City of New York for a declaration that certain grants, allocation of funds and tax exemptions to the United Nations made by the City of New York were invalid. The Attorney-General of the United States brought to the attention of the Court the rights of immunity granted to the U. N. by the Department of State, which was predicated upon Articles 104 and 105 of the U. N. Charter. The Court, after a review of a long line of precedents, declared itself bound to accord recognition to the immunities presented by the Department of State.

#### UNITED STATES DISTRICT COURT

95. Balfour Guthrie & Company v. United States

(1950) 90 F. Supp. 83

[Please refer to Chapter XXXII at page 382]

#### INTERNATIONAL COURT OF JUSTICE

- 96. Case concerning right of access of Portugal to certaia territories of India
- 97. Case concerning Right of Passage over Indian Territory

(Portugal v. India)—On Merits

[Please refer to Chapter XXXIX at pages 483-488]

98. Ambatielo's Case

99. Nottebohm Case

100. Minquiers and Ecrehos Case

101. Aerial Incident Case (Israel v. Bulgaria)
[Please refer to Chapter XXXIX at pages 481-483 & 490.]

102. Effect of Awards of compensation made by the United Nations Administrative Tribunal

#### 103. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania

- 104. International Status of South-West Africa
- 105. Voting Procedure on Questions relating to Reports and Petitions concerning the territory of South-West Africa
- 106. Admissibility of Hearings of Petitioners by the Committee on South-Africa

#### 107. Constitution of the Naritime Safety Committee of the International Governmental Maritime Consultative Organization

[Please refer to Chapters VIII, XXXII & XXXIX at pages 98-99, 391 & 495-497].

#### APPENDIX D

### Charter of the United Nations1

#### PREAMBLE

We the peoples of the United Nations determined

to save succeeding generations from the scourge of war, which twice in our life time has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of International Law can be maintained, and

to promote social progress and better standard of life in large freedom, and for these ends

to practice tolerance and live together in peace with one another as good neighbours, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

1. The Charter of the United Nations was adotted at San Francisco on June 25, 1945, and was signed the following day. It came into force on October 24, 1945, when a majority of the signatories had ratified it.

Amendmen's to Article 23, 27 and 61 of the Charter were approved by the United Nation's General Assembly or December 17, 1963, at the Assembly's eighteenth session, and came into force on August 31, 1965

Amendment to Art 109, paragraph 1, was approved by the United Nations General Assembly on December 20, 1965, and entered into force on June 12, 1968.

have resolved to combine our efforts to accomplish these aim .

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organisation to be known as the United Nations.

### CHAFTER I-PURPOSES AND PRINCIPLES

## Article 1. The Purposes of the United Nations are :

- 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and International Law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
- 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
- 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
- 4. To be a centre for harmonising the actions of nations in the attain-
- Article 2. The Organisation and its members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following principles:
- 1. The Organisation is based on the principle of the sovereign equality of all its members.
- All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
- 3. All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
- 4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.
- 5. All members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.
- 6. The Organisation shall ensure that States which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.
- 7. Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

### CHAPTER II—MEMBERSHIP

- Article 3. The original members of the United Nations shall be the States which, having participated in the United Nations Conference on International Organisation at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.
- Article 4. 1. Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organisation, are able and willing to carry
- The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommenda-
- Article 5. A member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security
- Article 6. A member of the United Nations which has persistently violated the principles contained in the present. Charter may be expelled from the Organisation by the General Assembly upon the recommendation of the Security Council.

### CHAPTER III-ORGANS

- Article 7. 1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a
- 2. Such subsidiary organs as may be found necessary may be established in accordance with the present charter.
- Article 8. The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

## CHAPTER IV-THE GENERAL ASSEMBLY

### Composition

- Article 9. 1. The General Assembly shall consist of all the members of the United Nations.
- 2. Each member shall have not more than five representatives in the General Assembly. Functions and Powers

- Article 10. The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and except as provided in Article 12, may make recommendations to the members of the United Nations or to the Security Council or to both on such questions or
- Article 11. 1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the members or to the Security Council or to both.

- 2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any member of the United Nations, or by the Security Council, or by a State which is not a member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the State or States concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.
- 3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger International peace and security.
- 4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.
- Article 12. 1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.
- 2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.
- Article 13. 1. The General Assembly shall initiate studies and make recommendations for the purpose of :-
- (a) promoting international co-operation in the political field and encouraging the progressive development of International Law and its codification;
- (b) promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
- 2. The further responsibilities, functions, and powers of the General Assembly with respect to matters mentioned in paragraph 1 (b) above are set forth in Chapters IX and X.
- Article 14. Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.
- Article 15. 1. The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.
- 2. The General Assembly shall receive and consider reports from the other organs of the United Nations.
- Article 16. The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters XII and XIII, including the approval of the trusteeship agreements for areas not designated as strategic.

- Article 17. 1. The General Assembly shall consider and approve the budget of the Organization.
- 2. The expenses of the Organization shall be borne by the members as apportioned by the General Assembly.
- 3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialised agencies referred to!in Article 57 and shall examine the administrative budgets of such specialised agencies with a view to making recommendations to the agencies concerned.

- Article 18. 1. Each member of the General Assembly shall have one vote.
- 2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include : recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1 (c) of Article 86, the admission of new members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of members, questions relating to the operation of the trusteeship system, and budgetary questions.
- 3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.
- Article 19. A member of the United Nations which is in arrears in the payment of its financial contributions to the Organisation shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the member.

Procedure

- Article 20. The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the members of the United Nations.
- Article 21. The General Assembly shall adopt its own rules of procedure. It thall elect its President for each session.
- Article 22. The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

### CHAPTER V-THE SECURITY COUNCIL Composition

Article 23.\*1 The Security Council shall consist of fifteen members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other members of the United Nations to be non-permanent members of the Security Council,

Amended. The text of the amended article was adopted by the General Assembly on the 17th December, 1963, and came into force on the 31st August, 1965. 90

due regard being specially paid, in the first instance to the contribution of members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

- 2. The non-permanent members of the Security Ccuncil shall be elected for a term of two years. In the first election of the non-permanent members, after the increase of the membership of the Security Council from eleven to lifteen, two of the four additional members shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.
- 3. Each member of the Security Council shall have one representative.1

#### Functions and Powers

- Article 24. 1. In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
- 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII.
- 3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration,
- Article 25. The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 26 .- In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the members of the United Nations for the establishment of a system for the regulation of armaments.

The original text of \rticle 2 reads as follows:

Article 23. 1. The Security Council shall consist of eleven Members of the United Nations. The Republic of China, France, the Union of Societ Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect sixother Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organisation, and also to equitable geographical distribution.

2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members, however, three shall be chosen for a term of one year. A retiring member shall not be eligible for immediate reelection.

3. Each member of the Security Council shall have one representative,

#### Voting

- Article 27\*1. Each member of the Security Council shall have one vote.
- 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.1
- Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members ; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.1

Procedure

- Article 28, 1. The Security Council shall be so organised as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organisation,
- 2. The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.
- 3. The Security Council may hold meetings at such places other than the seat of the Organisation as in its judgment will best facili tate its work.

Article 29. The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

- Article 30. The Security Council shall adopt its own rules of procedure, including the method of selecting its President,
- Article 31. Any member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that member are specially affected.
- Article 32. Any member of the United Nations which is not a member of the Security Council or any State which is not a member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a State which is not a member of the United Nations.

### CHAPTER VI—PACIFIC SETTLEMENT OF DISPUTES

- Article 33. 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution ly negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
- The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.
- Article 34. The Security C uncil may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute,
- \*As Amended The text of the amended article was adopted by the General Assembly 17th December, 1963, and came into force on the 31st August, 1965.

Th original text of Article 27 reads as follows:

Article 27. 1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

- Article 35. 1. Any member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.
- 2. A State which is not a member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.
- 3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.
- Article 36. 1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.
- The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.
- 3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.
- Article 37. 1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.
- If the Security Council deems that the continuance of the dispute is
  in fact likely to endanger the maintenance of international peace and security,
  it shall decide whether to take action under Article 36 or to recommend such
  terms of settlement as it may consider appropriate.
- Article 38. Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

## CHAPTER VII—ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

- Article 39. The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.
- Article 40. In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.
- Article 41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic

relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

- Article 42. Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of members of the United Nations.
- Article 43. 1. All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
- Such agreement or agreements shall govern the numbers and types
  of forces, their degree of readiness and general location, and the nature of the
  facilities and assistance to be provided.
- 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and members or between the Security Council and groups of members and shall be subject to ratification by the signatory States in accordance with their respective constitutional processes.
- Article 44. When the Security Council has decided to use force it shall, before calling upon a member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that member, it the member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that member's armed forces.
- Article 45. In order to enable the United Nations to take urgent military measures, members shall held immediately available national airforce contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.
- Article 46. Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.
- Article 47. 1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.
- 2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that member in its work.
- The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

- 4. The Military Staff Committee, with the authorisation of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.
- Article 48. 1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the members of the United Nations or by some of them, as the Security Council may determine.
- Such decisions shall be carried out by the members of the United Nations directly and through their action in the appropriate international agencies of which they are members.
- Article 49. The members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.
- Article 50. If preventive or enforcement measures against any State are taken by the Security Council, any other State, whether a member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.
- Article 51. Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

### CHAPTER VIII—REGIONAL ARRANGEMENTS

- Article 52. 1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
- 2. The members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
- 3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the States concerned or by reference from the Security Council.
- 4. This Article in no way impairs the application of Articles 34 and 35.
- Article 53. 1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council, with the exception of measures against any enemy State, as

defined in paragrapth 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such State, until such time as the Organisation may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a State.

 The term enemy State as used in paragraph 1 of this Article applies to any State which during the Second World War has been an enemy of any signatory of the present Charter.

Article 54. The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

## CHAPTER IX—INTERNATIONAL ECONOMIC AND SOCIAL CO-OPERATION

- Article 55. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
  - (a) higher standards of living, full employment, and conditions of economic and social progress and development:
  - (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
  - (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.
- Article 56. All members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.
- Article 57. 1. The various specialised agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.
- 2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialised agencies.
- Article 58. The Organisation shall make recommendations for the co-ordination of the policies and activities of the specialised agencies.
- Article 59. The Organisation shall, where appropriate, initiate negotiations among the States concerned for the creation of any new specialised agencies required for the accomplishment of the purposes set forth in Article 55.
- Article 60. Responsibility for the discharge of the functions of the Organisation set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

# CHAPTER X-THE ECONOMIC AND SOCIAL COUNCIL

## Composition

Article 61.\* 1. The Economic and Social Council shall consist of twenty-seven members of the United Nations elected by the General Assembly.

2. Subject to the provisions of paragraph 3, nine members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.

- 3. At the first election after the increase in the membership of the Economic and Social Council from eighteen to twenty-seven members, in addition to the members elected in place of the six members whose term of office expires at the end of that year, nine additional members shall be elected. Of these nine additional members, the term of office of three members so elected shall expire at the end of one year, and of three other members at the end of two years, in accordance with arrangements made by the General Assembly.
- 4. Each member of the Economic and Social Council shall have one representative.1

## Functions and Powers

- Article 62. 1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the members of the United Nations, and to the specialised agencies concerned.
- 2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.
- 3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.
- 4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.
- Article 63. 1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.
- 2. It may co-ordinate the activities of the specialised agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the members of the United Nations.
- Article 64. 1. The Economic and Social Council may take appropriate steps to obtain regular reports from the specialised agencies. It may
- \*As amended. The text of the amended article was adopted by the General Assembly on the 17th December, 1963, and came into force on the 31st August, 1965.

The original text of Article 61 reads as follows

Article 61. 1. The Economic and Social Council shall consist of eighteen Members

of the United Nations elected by the General Assembly.

- 2. Subject to the provisions of paragraph 3. six members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.
- 3. At the first election, eighteen members of the Economic and Social Council shall be chosen. The term of office of six members so chosen shall expire at the end of one year, and of six other members at the end of two years, in accordance with arrangements mode by the General Assembly.

4. Each member of the Economic and Social Council shall have one representative.

make arrangements with the members of the United Nations and with the specialised agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly.

2. It may communicate its observations on these report to the

General Assembly.

Article 65. The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.

Article 66. 1. The Economic and Social Council shall perform such functions as fall within its competence in connection with the carrying out of the recommendations of the General Assembly.

2. It may, with the approval of the Gene al Assembly, perform services at the request of members of the United Nations and at the request of

specialised agencies.

3. It shall perform such other functions as are specified elsewhere in the present Charter or as may be assigned to it by the General Assembly.

- Article 67. 1. Each member of the Economic and Social Council shall have one vote.
- 2. Decisions of the Economic and Social Council shall be made by a majority of the members present and voting.

Procedure

- Article 68. The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.
- Article 69. The Economic and Social Council shall invite any member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that member.
- Article 70. The Economic and Social Council may make arrangements for representatives of the specialised agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialised agencies.
- Article 71. The Economic and Social Council or may make suitable arrangements for consultation with non-governmental ganisations which are concerned with matters within its competence. Such arrangements may be made with international organisations and, where appropriate, with national organisations after consultation with the member of the United Nations concerned.
- Article 72. 1. The Economic and Social Council shall adopt its own rules of procedure, including the method of electing its President.
- 2. The Economic and Social Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

CHAPTER X1-DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES

Article 73. Members of the United Nations whi h have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the

interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end :

(a) To ensure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement,

their just treatment, and their protection against abuses,

(b) To develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

(c) To further international peace and security;

- (d To promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialised international bodies with a view to the practical achievement of the social, economic and scientific purposes set forth in this Article; and
- (e) To transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Article 74. Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic and commercial matters.

# CHAPTER XII—INTERNATIONAL TRUSTEESHIP SYSTEM

Article 75. The United Nations shall establish under its authority an international trusteeship system for the administration; and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinaster referred to as trust territories.

Article 76. The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article I of the present Charter, shall be :

- (a) To further international peace and security;
- (b) To promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
- (c) To encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world ; and
- (d) To ensure equal treatment in social, economic, and commercial matters for all members of the United Nations and their nationals,

and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

- Article 77. 1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship
  - (a) Ferritories now held under mandate;
  - (b) Territories which may be detached from enemy States as a result of the Second World War; and
  - (c) Territories voluntarily placed under the system by States responsible for their administration.
- It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and
- Article 78. The trusteeship system shall not apply to territories which have become members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.
- Article 79. The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the States directly concerned, including the mandatory power in the case of territories held under mandate by a member of the United Nations, and shall be approved as provided for in Articles 83 and 85.
- Article 80. 1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which members of the United Nations may respectively be parties.
- 2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.
- Article 81. The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more States or the Organisation itself.
- Article 82. There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.
- Article 83. 1. All functions of the United Nations relating to strategic areas including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.
- 2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.
- The Security Council shall, subject to the provisions of the trusteeship. agreements and without prejudice to security considerations, avail itself of the assistance of the Crusteeship Council to perform those functions of the United

Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

- Article 84. It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defence and the maintenance of law and order within the trust territory.
- Article 85. 1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.
- 2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

### CHAPTER XIII-THE TRUSTEESHIP COUNCIL

### Composition

Article 86. 1. The Trusteeship Council shall consist of the following members of the United Nations:

- (a) Those members administering trust territories;
- (b) Such of those members mentioned by name in Article 23 as are not administering trust territories; and
- As many other members elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those members of the United Nations which administer trust territories and those which do not.
- 2. Each member of the Trustceship Council shall designate one specially qualified person to represent it therein.

### Functions and Powers

Article 87. The General Assembly and, under its authority, the Trustee-ship Council, in carrying out their functions, may:

- (a) Consider reports submitted by the administering authority;
- (b) Accept petitions and examine them in consultation with the administering authority;
- (c) Provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and
- (d) Take these and other actions in conformity with the terms of the trusteeship agreements.

Article 88. The Trusteeship Council shall formulate a questionnaire on the political, economic, social, and educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

#### Voting

Article 89. 1. Each member of the Trusteeship Council shall have one vote.

2. Decisions of the Trusteeship Council shall be made by a majority of the members present and voting.

#### Procedure

- Article 90. 1. The Trusteeship Council shall adopt its own rules of procedure, including the method of selecting its President.
- 2. The Trusteeship Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.
- Article 91. The Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialised agencies in regard to matters with which they are respectively concerned.

# CHAPTER XIV—THE INTERNATIONAL COURT OF JUSTICE

- Article 92. The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.
- Article 93. 1. All members of the United Nations are ipso facto parties to the Statute of the International Court of Justice.
- A State which is not a member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.
- Article 94. 1. Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
- 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.
- Article. 95. Nothing in the present Charter shall prevent members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

Article. 96. 1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any

legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

## CHAPTER XV-THE SECRETARIAT

Article 97. The Secretariat shall comprise a Secretary-General and such staff as the Organisation may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organisation.

Article 98. The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organisation.

- Article 99. The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.
- Article 100. 1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organisation. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organisation.
- Each member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.
- Article 101. 1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.
- 2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.
- 3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

# CHAPTER XVI-MISCELLANEOUS PROVISIONS

- Article 102. 1. Every treaty and every international agreement entered into by any member of he United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
- No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.
- Article 103. In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.
- Article 104. The Organisation shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
- Article 105. 1. The Organisation shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes.
- 2. Representatives of the members of the United Nations and officials of the Organisation shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the members of the United Nations for this purpose.

## CHAPTER XVII—TRANSITIONAL SECURITY ARRANGEMENTS

Article 106. Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, October 30, 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other members of the United Nations with a view to such joint action on behalf of the Organisation as may be neces sary for the purpose of maintaining international peace and security.

Article 107. Nothing in the present Charter shall invalidate or preclude action, in relation to any State which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorised as a result of that war by the Governments having responsibility for such action.

# CHAPTER XVIII-AMENDMENTS

Article 108. Amendments to the present Charter shall come into force for all members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the members of the United Nations, including all the permanent members of the Security Council.

Article 109.\* 1. A general conference of the members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each member of the United Nations shall have one vote in the conference.

2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two-thirds of the members of the United Nations including all the permanent members of the Security Council.

3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

# CHAPTER XIX-RATIFICATION AND SIGNATURE

Article 110. 1. The present Charter shall be ratified by the signatory States in accordance with their respective constitutional processes.

The ratification shall be deposited with the Government of the United States of America, which shall notify all the signatory States of each deposit

\* The text of the amended article so as to increase the number of votes required for the concurrence by the Security Council from seven to nine was adopted by the General Assembly on December 20, 1965, and entered into force on June 12, 1968.

as well as the Secretary-General of the Organisation when he has been appointed.

- 3. The present Charter shall come into force upon the deposit of ratifications by the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and by a majority of the other signatory States. A protocol of the ratifications deposited shall thereupon be drawn up by the Government of the United States of America which shall communicate copies thereof to all the signatory States.
- 4. The States signatory to the present Charter which ratify it after it has come into force will become original members of the United Nations on the date of the deposit of their respective ratifications.
- Article 111. The present Charter, of which the Chinese, French, Russian, English and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of the signatory States.

IN FAITH WHEREOF the representatives of the Governments of the United Nations have signed the present Charter.

DONE at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five.

# **INDEX**

A

Absolute Contraband 610 Absorption, Non-recognition of, 127 Abstention, Duties of, 596 Accession 333 Accretion 198, 206, 214, 216 Acquiescence, Duties of, 597, 598 Acquisition 214, 216 Adhesion 333 Adjudication 215 Administration 198, 199, 204 Admissibility of hearings of petitioners by the Committee on South-West Africa494,709 Admission of a State to Membership in the U. N. 116, 491, 690 Admission of a State to the United Nations, Competence of the General Assembly for the, 15, 363, 378, 491, 690 Adolf Eichman, The Case of, 657-699 Advisory Opinions of International Court of Justice 491-498 Aerial Incident case (Israel v. Bulgaria) 490, 708 Affair of the Trent 620, 704, 707, 708 Agreation 302 Aggression, Definition of, 56 Aggressive•War 57 Air, Five Freedoms of the, 187, 188 Air, Sovereignty over the, 186-189 Air Space, Theories as to the, 135, 186 Aircraft and Prize Law 560 Aircraft piracy 240-244 Air Warfare, Laws of, 560-565 Air Warfare Rules, 1923, 562 Alabama Claims, The, 25, 701 Alaska Boundary Arbitration, The, 165 Albericus Gentilis 34, 42 Algeria, The Question of, 410 Alien Enemy 534 Aliens 244-248, 294, 295 Allegiance 253 Alliances and Commercial Treaties 346, :47 Altmark, The, 703, 704 Alwaki, The, 613 Amand v. Secretary of State for Home Affairs 659, 660 Amazone, The, 312, 688

Ambassadors 300 Ambatielos Case 481, 708 Ambiorix 250 American Neutrality 162, 591 American States, The Organization of, 440 Amicable Means 500 Angary, Right of, 599-602 Anglo-Iranian Oil Dispute 407, 478, 689, 690 Anglo-Norwegian Fisheries Gase 478, 671 Anna 174, 207 Annexation 212, 547, 548, 694-697 -Anticipated, 548, 697 -Premature, 548, 697 Anticipatory self-defence 380 Anzus Pact 435 Appam, The, 599, 702 Aqaba Gulf 193-196, 418, 420, 421 Arab League 438 Arantzazu Menti, S. S. v. The Govern. ment of Republican Spain 72, 121, 122, 130, 649 Arbitral Procedure 61 Arbitration 502, 503 Arbitration, Permanent Court of, 466. 468, 638 Archipelagos 176 Arestidou v. Same 267, 681 Armistice 198, 582, 640 Armaments, Regulation and Reduction of, 444-448 Arms, Suspension of, 582 Armstrong, General, 599 Arton, In re., 267 Asama Maru 619, 621, 704 Asya, Naim Molvan, Owner of Motor Vessel, v. Attorney General for Palestine 295, 661 Asylum 90, 245, 273-277, 296, 297, 311, 577, 678, 679 -Diplomatic 273, 275, 310 -Extra-territorial 296, 297 -Territorial 278, 296, 297, 310 Axis Leaders, Extradition of, 278 Atalanta, The, 620 Atlantic Charter 286, 357

Atom Bomb, Ethics of, 564 Atomic Energy Commission 444, 564 Atomic tests over high seas 221 Attentat Clause 267

Austinian theory 8, 9, 10 Auto limitation 16 Award 215, 467 Aziz Ouloug-zade Case 275, 311

B

Baghdad Pact 438 439 Balance of Power 151, 159, 431, 432 Balfaur Guthrie & Company v. United States 382, 708 Balkan Pact 436 Balthazar Ayala 34, 42 Bangladesh's admission to U. N. 118 Bangladesh to U.N. membership Blockirg of, 364 Bank of China v. Wells Fargo Bank & Union Trust Company 116, 123, 125, 130654,655 Bank of Ethiopia v. National Bank of Egypt and Liguori 121 Banks 177 Barcelona Conference 167, 191 Baselines, Straight, 184 Basis of International Law 15-18 Bays 181 Bed of the Sea 219 Belgium 102, 103 Belligerency 133, 134 Belligerency, Co. 135 Benelux 440 Belligerent Occupation 543-549, 694 Bergman v. De Sieyes 312, 314, 687, 688 Berlin Blackade, The, 406 Berlin Treaty, 1878, 167, 283 Bermuda 616 Betsey 605, 607

Bhutan 93 Bilateral treaties 336 Black Sea 181 Blockade, 506, 588, 602-603, 613, 614, 615, 698-700, 706 Breach of, 605 Cessation of, 606 Close, 608 Forms of, 604 Essentials of a Real and Binding, 60 t Long Distance, 697 Pacific, 506, 604 Penalty for breach of, 606 Proof required, 607 Blonde and other ships, The Case of, 555 Bosphorus 173, 181 Boundaries 165, 166 Brezhnev Doctrine 160 Brierly 2, 9, 12, 19 British Protectorates 93 Brown v. United States 514 Brown Claim, Robert E., 143 Brussels Conference 560 Brussels Treaty, 1948, 434 Baller v. Harrison 686 Bundesstaat 87 Bynkershoek, Cornelius Van, 1, 36, 44, 621

C

Cabotage 177, 615
Calvo Clause, The, 248
Cambodia v. Thailand 672, 673
Canals 168
Canevaro Case 257, 468
Cargoes 31
Caroline, The, 148, 160 163, 231, 705
Casabianca case 467
Casanova v. Fitzpatrick 688
Castioni, In re., 265, 675
Casus foederis 3 7
Central Treaty Organisation 438, 439
Cession 198, 207, 208, 214, 215, 216, 255
Charges d'Affaires, 300, 301
Charkieh, The, 651

Charter of the United Nations 361, 362, 363, 428-430, 709

-Erosion of Art. 2,4) of the, 361

-Revision of, 400-402

Chicago Convention 184, 188

Child's domicile 259

China, S. S., 621, 704

China's admission in the U. N. 363

Chinese Exclusion case 247

Chorzow. The Case concerning the Factory at, 350, 472

Chorzow, Factory (Indemnity) 350

Chung Chi Cheung v. The King 71, 223, 230, 232, 643, 644

Citizenship 252, 254

City of Berne in Switzerland v. The Bank of England 655

Civil aircraft, Attack on, 564

Civil Air Transport Incorporated v. Central Air Corporation 72, 122, 129, 647-649

Civil Aviation Organisation 183, 462 Civil wars, Intervention in, 153

Clipperton Island Arbitration case 199

Close blockades 608 Co-belligerency 135

Codification of the Law of Nations 38,

-- and the League of Nations, 51, 52

-- and U. N. Charter, 52, 53 Collective Non-recognition 120 Collective Penalty 545

Collective Recognition 119 Collective Security 427-442

---, Soviet system of, 437 Collision, Cases of, 233

Colombo Plan, The, 441

Columbian Peruvian Asylum case 21, 275, 297, 678, 679

Comity, International, 28

Commissions of Enquiry, International, 502

Commercial ships, State-owned, 233

Commercial Treatics 346, 347

Commonwealth in International Law, Position of, 111

Commonwealth of Nations 107-112

Campetence of the General Assembly for the Admission of a State to the United Nations 15, 363, 378, 492, 690

Complaints 504

Composite Communities 86 Compulsive means 504-507

Compulsive Settlement of Disputes 374

Conciliation 502

Conditional contraband 611, 612

Conditional Recognition 118

Conditions of Admission of a State to Menbership in the U. N. 363

Condominium 88, 164, 165, 204

Confederation 87

Conflict of laws 6

Chatto Har 1962.

Congo Crisis 412, 413 Congo, The, 168, 412

Conquest 198, 212, 213, 214, 523, 534, 655, 656

Conquest of Moon and Mars 204

Consent theory 16 Consensualism 75

Consolato del Mare 32, 33, 531

Constantinoples Convention of, 1888, 169, 171, 192, 193, 197

Constitutive theory of recognition 113-115

Consular Intercourse and

Immunities, Diplomatic and, 62,

Consular Office, Termination of, 323 Consular Relations, 1963, Convention on Vienna, 62

Consuls 320-323

Contiguous zone 57, 185

Continental Shelf, The Doctrine of, 57, 58, 177-181, 667-669

Continuous Transportation 615-617, 706

Continuous Voyage, Doctrine of, 614, 615-617, 70

Contraband 610-618, 619, 706

Contracts and treaties 328, 329 Contributions 546

Convoys 622, 702

Cook v. James Gordon Sprigg 655

Cook v. United States 249

Corfu Channel Dispute 148, 164, 173, 176, 184, 193, 197, 233, 407, 479,

480, 669-671

Corinth Canal, The, 173 Corporation 532

Creole 222, 661

Gristina, The, 70, 224, 250, 647

Cuba, Quarantine of, 609

Curran v. Cit) of New York 708

Custom 21

Custom and Usage 21, 22, 644

Cutting case 224, 247

Czechoslavakia, Russian Occupation of, 421

D

Daimler Co. Ltd. v. Continental Tyre & Rubber Co. (Great Britain) Ltd. 5 2, 533, 534, 694

Danzig, Jurisdiction of the Court of, 283 Danzig Railway Officials case 298

Danzig, Treatment of Polish Nationals in, 335, 472 Dardanelles, 173 Deceit 542, 543

Declaration of London 51, 357, 529, 550, 551, 552, 603, 604, 605, 610, 611, 612, 613, 615, 616, 617, 618, 622, 6**2**4 Declaration of Panama, 507, 591 --ofParis, 11, 37, 49, 531, 553, 587, 588 ---of Philadelphia, 460 --- of St. Petersburg, 1868, 37, 536 Declaration of Paris (1856) 37, 49, 549, 587, 589, 603, 604 Declaratory theory of recognition 113-Decolonization, Towards, 395-3991 De facto Recognition 120-122 De Huber v. The Queen of Portugal 293 De Ture Belli ac Pacis 34, 35, 586 De Jure Recognition 120-124 Delegation Theory 69 Deportation 277, 679, 680 Deprivation 263 Dereliction 216 Diminutive States, The Question of, 103-105 Diplomatic Agents 298-319, 687, 688 Diplomatic Asylum, 275, 31 Diplomatic Corps 301 Diplomatic immunities 304-313,687,688 Diplomatic mission, Termination of, 316-319 Diplomatic Privilege 687, 688 -Theories of, 305 Diplomatic Relations, 1961, Vienna Convention on, 61, 62, 299, 302 Diplomatic Status, Proof of, 315 E Earl Russel's case 222

Diplomats, International Terrorism and Protection of, 318, 319 Direct United States Cable Co. Ltd. v. Anglo-American Telegraph Co. Ltd. 206, 665, 666 Disarmament 443-460 --Decade 457 Discovery 199, 666, 667 Disputes, Settlement of, 500-507 Doctrine of Incorporation 71-73 Doctrine of Necessity and Self-Preservation 160, 164, 594 -- and Neutrality, 594 Doctrine of Postliminium and Recapture 578-581 Domicile 253, 519, 521, 532 ---Child's 259 Double Criminality 270, 279, 678 Double Nationality 256, 257, 278 674 Double Veto 378-380 Doyen 301 Droit des gens 1, 2 Dual nationality 256, 257, 259, 674 Drago Doctrine 159, 160 Driefontein Consolidated Gold Mines v. Janson 508, 512, 521 Dualistic Theory 66, 67 Duff Development Co. Ltd. v. Government of Kelantan & another 84, 122, 225, 315, 651, 652 Dumbarton Oaks Conference 358, 367, 368 Dunkirk Treaty 434

East European Treaty Organisation 437, 438 Eastern Greenland case 199, 213, 472 Economic and Political Cooperation 440, 441 Economic and Social Council 393, 711, 720, 721 Economic Commission for Asia and the Far East (ECAFE) 464 Economic Commission for Europe (ECE) 464 Economic Commission for Latin America (ECLA) 464 Ecrehos case, Minquiers and, 483, 708 Egypt-Syria Defence Pact 437 Eichmann Adolf v. The Attorney-General af the Government of Israel, 657-659

Eisenhower Doctrine for the Middle East 440

Eisler's Case 279, 678

Elliott, Ex parte, 296, 674

Embargo, Hostile, 506

Emden 553

Enemy 520, 521-523

Enemy Character, 519-534, 694

—Property, 531

—Service 619

—Territory 523

—Vessels 529

Enforcement of Decisions of International Organizations 399, 400

Engelke v. Musmann, 72, 315

Envoys Extraordinary 300 Equidistance line 667 Equidistance Method 667, 668
Estrada Doctrine 128, 129
European Convention for the Protection of Human Rights 39, 290-292
European Coal and Steel Community 440
European Commission of Human Rights 291
European Court of Human Rights 292
European Defence Community 435
European Economic Community 441
European Economic Co-operation,
Organisation for, 440
European Payments Union 440

Evidentiary theory of recognition 113, 115

Exchange, Schooner, 227, 232, 664

Execution of Judici 1 decisions 478

Executory contract 52

Exequator 118, 321, 323

Expatriation 262

Express and Implied Recognition 118

Expulsion, Law of, 275

Expulsion of aliens 244

Exterritoriality 224-228, 232, 233, 305

643

Extradition 249, 263-280, 296, 674-684

—Necessary conditions 265-271

Factor v. Laubenheimer 264, 270
Facultative view of recognition 117
Federal State 87
Fides etiam hosti servanda 518
Fines 546
Fisheries and conservation 185
Fisheries in the open sea 185, 219
Fishing, Convention on, 58
Five F reedoms of the Air 187, 188
Food and Agriculture Organization of the United Nations 462
Force Majeure 209, 238, 339
Foreign Office, Information from, 122
Formosa, Legal Status of, 201-204

Fox, The, 557
France v. Great Britain 249, 277
Francis Suarez 34, 42
Franciska, The, 604, 605, 606, 607
Franconia case, 5, 14, 23, 27, 70, 174
Frederick Molke 607
French Protectorates 93, 94
Friendship, The, 620, 707
Frontiers of a State, Change in, 140
Fugitive 249, 278, 677
Full Powers 301, 301
——, Special, 331
Fundamental Rights, Theory of, 16

G Gagara 121 Gatt 465 Geipal v. Sm th 603, 605 General Agreement on Tariffs and Trade (GATT) 464 General Assembly 365-375, 711 -Relation of, with the Security Council, 383 General Principles of Law 23 Geneva Conference, 1930, 167 Geneva Conference, 1932, 443 Geneva Conference on detection of nuclear weapon tests 449 Geneva Conference on the La v of the Sea (1958) 57, 182-186 Geneva Conference on Suspension of Nuclear Tests 449 Geneva Convention, 1864, 21, 37, 518, 535, 537 Geneva Conventions of 1929, 21, 38 537, 542

Geneva Convention, 1936, 265 Geneva Conventions Act 694-698 Geneva Conventions, 1949, 535, 538, 539, 546, 547, 553, 626-637 -On the High Seas, 1958, 241 Geneva Gas Protocol 536 Genocide 58, 63, 64, 573 Genocide Convention 59, 79, 285 Genocide Convention Case, Advisory Opinion on Reservations to the, 332, 333 Gentilis, Albericus, 27, 34, 42 Gerasimo's case 524, 525 German Settlers in Poland 141, 471 Germany, Legal Status of, 200, 201 Gilbert In re., 229 Goa, Liberation of, 213, 214 Godfrey's case 278, 677 Good Offices 501 Governments, Recognition of, 126 Government in Exile, Recognition of,

Greece 405 Greeks 31, 40 Greco-Bulgarian Communities, 76, 336 Grotians 35, 36, 45

Grotius, 27, 34, 35, 42-44, 586 Guarantee treaties 346, 347 Gulfs 181 Guerilla warfare 509

#### H

Hague Codification Conference 176, 217, 257 Hague Conferences 37, 50, 52, 529, 561, 565, 587, 638-642 Hague Conventions 535, 536, 556, 582, 596, 597, 702, 703 -- of 1930 on Conflict of Nationality Laws 262 Hague Convention, 1970, 245 Hague Regulations 520, 535, 536, 537, 640 -Rules concerning Land Warfare of 1899 & 1907, 11 Haile Sellasie v. Cable and Wireless Ltd. 652, 653 Hallstein's Doctrine 117 Hans Muller of Nurenberg v. Superintendent, Presidency Jail, Calcutta 275 Harmony, The, 521 Harvard Draft Declaration on Nationality 252 Harvard Draft Convention on Territorial Waters of 1929, 196 Havana Convention on Asylum 297,679 Havana Convention on Commercial Aviation 187 Havana Convention on Consuls, 1928,

Hay Pauncefote Treaty 172, 192, 196, 197, 335 Haya de la Torre's case 275, 279, 311, 478, 678, 679 Hesse Cassel case 580, 581 High Commissioner 301, 303 High Seas, Legal conception on the freedom of the, 218, 219 -Regime of the, 57, 58 Hijacking 240-244 Hiroshima 560 Hirota v. McArt'ur 661 History of International Law 29-39 Hobbes 44 Hospital ships 553, 554, 628 Hostages 562, 576 Hostile Embargo 506 Hostile Service 619 Hot Pursuit, The Doctrine of, 182, 218, 233 Holy Sec 105-107, 300 Hugo Grotius 32, 35, 43, 44 Huig van Groot 34, 35, 43, 44 Human Environment 186 Hungarian Affairs, Soviet Intervention in, 14'), 411 Hyderabad 188

#### I

Immunities, Diplomatic, 306-314, 687, 688 -, Sovereig : 634, 685 -, State, 685 Implied Recognition 118 Incorporation, Doctrine of, 71-73 India 73, 257 India and Pakistan, Armed Conflict between, 414-418 -Nationality in, 257 Indian Ocean as a zone of Peace, Concept of, 458 Indian States 90 Individual in Internation al

Place of the, 280-298, 674

297 615

I'm alone 182, 671

Immanuel 618

Indonesia 405 India-Bangladesh Treaty, 1972, 440 Indo-Pak. War, 1971, 425 Indo-Soviet Friendship Treaty, 1971, 439 Innocent Passage, Right of, 233, 314, 687 -through International Straits, 184 Insurgency 13, 135 Inter-American Defence Treaty of Reciprocal Assistance 434, Interim Committee 365, 367 Interim Measures 478, 6.9 Inter-Governmental Maritime Consult tive Organization 465 International Atomic Energy Commission 465

VII

INDEX International Bank for Reconstruction and Development 462 International Civil Aviation Organization 188, 462 International Comity 28, 647 International Commission of Enquiry 502 International Convention on the Elimination of all forms of Racial Discrimination 292 International Court of Justice 472-498, 689-691, 725 ——Advisory Opinions 491-498 -- Cases before the, 479-491 -Jurisdiction of the, 474, 689 -Procedure of the, 477 International Criminal Jurisdiction, International Development Association 463 International Finance Corporation International Human Rights Instruments 292, 293 International Labour Organization (ILO) 460, 461, 462 International Law, Basis of, 13-1; ---, Defects of 13, 11, 15 ---, Definitions of 1-6, 646 ---, History of, 29-39 ---, Importance of, 1 ---, Is it true law, 8-15 -- , Nature of, 1-18 --, Origin of, 1 ---, Public & Private, 6 ---, Sources of, 19-29 ---, Subject-matter of, 7 ---, Subjects of, 78-80

International Law True Law, Is, 8-13 International Law and Municipal Law, Relation between, 65-76, 645, 646, 647 International Law Commissi on 53-62, International Monetary Fund 463 International Persons 651 International Refugee Organization 463 International Tele-communication Union 186, 464 International Terrorism and Protection of Diplomats 318, 319 International Torts and Damages 348-350, 646 International Trade Organization I. T. O. 465 International Trusteeship Mandates 102 International Umon of Official Fravel Organization 465 International Waterways, Passage of, Ships through, 191-198 Interpretation of Peace Treaties with Bulgaria, Hungary and Romania 495, 709 Interpretation of Treaties, 343-346 Intervention 146-160, 507 -Invitational Law 150 -Kinds of, 147 -Grounds of, 148-153 Invalid Treati es 334 Invitational Intervention 150 Ionian Ships, The, 92, 650, 651 Island of Palmas case 199, 468 Islands 176 Israel v. Bulgaria, 490, 708 Israel v. Eichmann 657-659

Janson v. Driefontein Consolidated Mines Ltd. 508, 512, 521, 692-694 Japanese Defence Pact, U. S.-436 Japanese House Tax Case 467 Joyce v. Director of Public Prosecution 223, 294 Juan Is mael & Co. Government of the Republic of Indonesia 226, 634 Judicial Decisions 23, 24 Junagadh 210 Jurisdiction 217-228, 651, 652, 657---, on the open sea 217

--, ov er aliens, 244-248 --, Civil and Criminal, 222 ---, of Municipal Courts in Scizures effected in contravention of International Law, 249-251 -- Immunity of Armed forces on

foreign territory 229-231

---, in the open sea, 217

---, over nationals, 222

---, over public and private vessels, 232-236

-Territorial, 659-662

Jurisdictional Immunity of Armed Forces on foreign territory, Qualified, 229-231 Juristic Theories 65 Jus Cogens, Doctrine of, 334, 342, 343 Jus gentium 31, 41, 239

Jus postlimini um 578 Jus sanguinis 254, 255; 269 Jus soli 254, 255, 257 Justice Case, The, 697 Justinian 39

Kashmir Problem 209-212, 410
Kellogg-Briand Pact 21, 38, 157, 567, 568, 569, 570
Kelsen's pluralistic theory 67, 68
Kent, Rex v. 687
Ker Illinois, 296, 674
Keynd R. v. 5, 14, 27, 70, 174, 176
Kiel Canal, The, 171, 191, 192, 343, 471, 671

Kaiser's case, Ex. 277
Kim, The, 617
Kolczynski case 266, 279, 681
Korea 162, 407-410
Korean War, Legal issues involved in, 407-410, 541
Korean War Prisoners, Repatriation of, 539, 540, 582
Kramer v. Attorney-General, 257, 674

L

Lakes and Land-locked seas 181 Land Warfare, Laws of, 535-543 Lateral line 667 Lateran Treaty 105, 106 Law of Nature 39-46 Laws of Air Wartare 560-565 Laws of Maritime Warfare 549-554 Laws of War 500-583 Leading Cases 643-709 League of Nations, 37, 51, 351-357, 384, 427 -- Causes for the failure of the, 355-357 League, Recognition and the, 132 Leases 215 Lebanon 407 Legation, Right of, 299, 300 Lena, The, 596, 705, Letter of Credence 300, 317, 318 to typito v Chatwo. s.c. 1999.

Letters of marque 505,553 Liechtenstein v. Guatemala 482 Lig' thouses Case 165, 345 Little Assembly 365, 367 Locarno, Treaty of, 38, 119, 181 London Declaration 51, 357, 529, 550, 551, 552, 588, 605, 610, 611, 612, 613, 615, 616, 617, 618, 622, 624 London Submarine Rules, Protocol ol, 1936, 552 Long distance blockade 607, 608 Lorimer 46 Loss of nationality 258, 259 Loss of State Territory 215, 216 Lotus, The S. S., 5, 222, 233 471, 472, 662-664 Lusitania, The, 350, 551, 552, 646 Luxemburg 102, 103 Lynch Clam, R. J., 252

M

Magiellana Steam Navigation Co. v.
Martin 304, 307, 308, 315
Magellan Pirates, The, 238
Magellan, Straits of, 192
Mailcerts 607
Main Committees 366
Maine on Law of Nature 41
Manchurian dispute 162
Mandate, Revocation of—for South
Africa, 99-101
Mandated Territories 94-96, 101, 354,
387, 690

Mandjur 597
Manila Pact 435, 436
Man's conquest over Moon and Mars 204, 205
Marginal belt 174
Maritime belt 174, 669-671
Marginal waters, Extent of, 174, 175
Maria, The, 26, 555, 615
Marianna Flora, 182, 218, 623
Maritime Belt 174, 669-671

Maritime Warfare, Laws of, 549-554 Marmora, Sea of, 173 Marshall Plan 440 Mashona, The, 693 Mavrommatis Palestine Concessions case 141, 296, 500 Median lines 667 Mediation 50, 502 Membership 362, 400, 711 Membership in the United Nations, Conditions of, Admission of a St. te to 118,362 -Admission of State to, 491 Meunier, In re. 266, 676 Miangas (or Palmas Island, 666, 667 Middle East, War in the, 419-421 Mighell v. Sultan of Johore 34,224,652,659 Military occupation 547, 640 Mines 551 Ministers plenipotentiary 300 Minquiers and Ecrehos ase 483, 548, 708 Mixed subjects 257 Mixed War 509 Modes of acquiring and losing State territory 198-216 —Original and derivative methods 214

Monetary Gold case 489, 690 Monistic Theory, The, 66, 74 -- Soviet view, 74 Monroe Doctrine, The, 155-159, 354, 386, 393 Monteiro, Rev. v. The State of Goa 681 Montevideo Convention 32, 114, 264 Montreux Convention 173, 181, 194 Moon and Mars, Conquest of, 204 Montreal Convention, 1971, 213 Mortensen v. Peters 71 Moscow Conference 358, 566 Moscow Test Ban Treaty, 1963, 449 Most-Favoured Nation Clause 347 Mosul Case 346, 353 Mubarak Ali's Case 278 Multilateral Conventions 55, 333 -Treaties, 36 Municipal Courts, Decisions of, 25, 26 Municipal Law, Relation between International Law and, 65-56, 645, 646, 698

Muscat Dhows Gase 219, 318 Mwenya, Ex parte 92

N

Nancy, The, 604 National Character, Change of, 524 Nationality 60, 143, 252-262, 293, 673, 698 ——Double, 256, 257, 259, 674 -Loss of, 258, 259 -- Modes of acquiring, 254, 255 Nationality Decrees in Tunis and Morocco 339 Naturalisation 254 Naturalists 34, 36, 45 Nature of International Law 1-18 Nature, Law of, 39-46 Naulila case, The, 24, 506, 691, 692 Navicerts 607 Necessity and Self-Preservation, Doctrine of, 160-164, 594 Neer Claim 245, 348 Negotiation 331, 500, 501 Nehru Doctrine 158 Nepal 190 Neutralised States 102 Neutral States 102, 103 Neutrality 585-59 , 701-705 —Kinds of, 585 --- Under the Charter, 593 -The Kellogg-Briand Pact, 590

--- Under the League of Nations, 589 Neutrality and Neutralization 103, Neutrals, Rights and Duties of, 595-Non-combatants, Position of, 56 Non-Centraband 611 Non-permanent Envoys 315 Non-Refoulment, Principle of, 274 Non-Self-Governing Territories 395, 721, 722 North Atlantic Fisheries Case, 181, 190, 467, 516 North Atlantic Treaty Organization 151, 158, 163, 230, 231, 395, 433, 434, 448 North Sea Continental Shelf Cases 667-669 Norwegian Loans issued in France, Case of the, 489, 490, 690 Nottebohm Case 482, 708 Non-Proliferation Treaty, Nuclear 1968, 451-453

Nuclear Test Ban Treaty, 1963, 449-451 Nulium crimen sine lege, nulla poenae sine

lege 568

Nuncios 300 Nuremberg Principles, 55, 657, Nuremberg Trial 284, 566-571, 577,700 Nyon agreement 239

O

Ocean 217
Occupation 198-205, 214, 523, 543, 635, 640, 657
Occupation, Belligerent, 543-549, 694, 696, 697
Open Seas, Fisheries in the, 219
Operations of Nature 216

Oppenheim, L, 2, 18, 19, 20, 114
Oriental Navigation Company 605
Orozembo, The, 620, 707
Ottoman Public Debt Arbitration 126, 142
Outer space, Peaceful uses of, 454
—Treaty, 453

Р

acific Blockade 506, 507 Pact, Regional, 432 Pacific Settlement of Disputes 374-376 715, 716 Pact of Paris 11, 21, 127, 548, 567, 568, 569, 570 Pacta Sunt Servanda 335, 336 Pacta Transitoria 517 Pakistan 87, 136, 139, 414-418 --, Agreement for Military Aid between, U.S.A. and, 439 -, and India, Armed conflict UCtween, 414-418 -, Barbarities committed in East Bengal by, 151 Pakistani Prisoners of War and their r epatriation 540, 541 Pakistani Prisoners of War and their Trial and War Crimes 573-576 l'alestine 406 Palmas case, Island of, 199, 468 Panama Canal, The, 172, 173, 192, 196 Panama, Declaration of, 507, 591 Panama Draft Declaration on the Rights and Duties of States 125 Papal Legates 300 Papal Nuncio 301 Paquete Habana v. United States 5, 644, 645

Passage of Ships through International Waterways 191-198 Peace, Effect of Treaty of, 546 Pearl Harbour Incident 512 People of Indian Origin in South Africa 246 Perfidy 543, 553 Permanent Court of Arbitration 466-468, 502, 639 Pacta sunt servanda 66 Permanent Court of International Justice 469-472 Personal · Treaties 325 Personal Union 87 Peterhoff Case, The, 611, 616, 706 Philippines Mutual Defence Treaty, U. S.-, 438 Pious Fund Case 467 Piracy 219, 237-244 -- Jure Gentium, In rc., 27, 237 Pirates and War Criminals 297 Plebiscite 209 Pluralistic Theory 67, 68 Polish Upper Silesia Case 140, 471 Political offence 265-267, 278, 675, 676, 67/7

Ports 181 Portugal Case concerning Right of access of, to certain Territories in India,

Positivism, Doctrine of, 17
Positivists 35, 36, 45
Postliminium and Recapture, Doctrine

of, 203, 578-581

Preach Vihear, Case Concerning the Temple
of, 672, 673

Prescription 198, 205, 206, 215, 216

Prevention, Duties of, 596

Parlement Belge, The, 84, 226, 227, 3.5, 656, 657, 659

Paris Congress, 1856, 167 Paris Convention, 1919, 187

553, 587, .88

Paris, 1856, Declaration of, 14, 37, 49

Paris, 1856, Treaty of, 167, 168, 178 Paris, 1898, Treaty of, 666

Partial Succession 136, 137

Prisoners of war 538-541 --Korcan, 539 --Pakistani, 540, 541 Private International Law 6 Private Ships 234, 235, 614 Privateers 553 Prize Courts 24, 26. 554-560, 693-700 --, German, 559 Protectorate 88, 91, 92

Quarantne of Cuba 609

Quirin, Ex parte, 284

Radicactive pollution 185 Rahimtoola v. Nizam of Hyderabad 685, Rapacki Plan 447, 448 Ratification 331, 332 Roumanian, The, 515, 516 Real Treaties 325 Real Union 87 Rebus sic stantibus 190, 339, 340 341, 368, 370 Reciprocity, Doctrine of, 265 Recognition of States 113-135, 647-650, 651, 652 -a legal or political problem, 116 -- and the League, 132 -and the U N. O., 132 -, Collective, 119 ---, Collective Non-, 120 ---, Conditional, 118 ---, Consequences of, 131, 32 ---, Considerations for, 124, 125 ----- Constitutive Theory of, 115-115 ---, Declaratory Theory of, 113-115 -. De facto and De jure, 120- 22 - Estrada Doctrine, The, 128, 129 -- Express and Implied, 118 -- Facultative view of, 147 ---- Hallestein's Doctrine, 117 -- of Governments, 125-127 -- of Government in exile, 127 --, Methods of, 130, 131 -- Retroactivity of, 129 ---, Stimson's Doctrine of Non-, 127 -- Theories of, 113 -- , Tobar Doctrine of, 127 -- Withdrawal of, 131

. ecover) 26, 555

Redintegration 25

Protectorates British, 93 --, French, 93 Public International Law and Private International Law 6 Public ships 219, 232-236, 623 Private vessel 252, 234, 623 Public War 509 Pufendorf, Samuel, 35, 36, 44 Prometheus, S. S., 11

Quislings, Asylum for, 577 - 0011/20 con

Refugees, Convention on the Status of, 64, 262 Refoulinant, Principle of Non-, 274 Regional and Security Arrangements 393, 394, 718 Regional Pacts 432, 433 Rendition 265 Renunciation 258 Repairs in a neutral country 597, 70 Reparation, Duties of, 528, 692 Reporation for Injuries Suffered in the Service of the United Nations 327, 328, 350, 382, 490, 690 Repatriation of war prisoners 539-541, Reprisal prisoner 577 Reprisals 05, 506, 507, 628, 629, 630, 646, 691, 692

---, General, 505 -- Negative, ibid -- Positive, ibid - - Special, ibid Republic Arabe Unie v. Dame X, 660, 661 Requisitions 546 Resumption 255 Retorsion 504, 505, 507 Retroactivity, Doctrine of, 649 Retroactivity of Recognition 129,130,649 Revision of the Charter 400-402 Revolt 144, 216 Rhodesian Declaration of Independence, Commonwealth on Trial on, 111, 112

Rhodesian Situation 418 Richards Claim 262 Right of Angary 599-602 Rio Pact, 1947, 434 Rivers 166

Rabert E Brown Claim 143 Rocks and Banks 177 Romans 31, 40 Rule of the War of 1756, 614, 615, 617 Rules of Strategem 537

St. Petersburg Declaration, 535, 537 SALT 454,455 San Francisco Conference 358, 367, 368, 370, 376, 379 Savarkar's case 249, 277, 468, ,504, 676 Schuman Plan 440 Schooner Exchange v, McFaddon 27, 232, ScuttledU .- Boats, The, 701 Sea, Bed of the, 219, 454 -- Peaceful uses of, 221, 222 --, Sub-soil under the, 219 ---, Geneva Convention on the Law of the, 1,5-180 Seabed Treaty, 1971, 455 Sea Warfare, Ruses in, 542, 552 Scarch 197, 198, 521, 622 Seas, Ato nic tests over, 221 --, Fisheries in the open, 219 --, Freedom of the, 294 ---, Legal conception on the freedom of the, 318 --. Subsoil under the, 220 Sebastiao Fransisco Xavier dos Remedios Monteiro v. The State of Goa 548, 694-698 Secretariat 357, 389, 711, 725, 726 Security Council 373-380, 383, 387, 711, 713-715 —— Survey of 404-427 Seethalakshmi v. Veerappa 513, 528 Self-Defence 380, 705 --- Anticipatory, 380 Self-Presevation, Doctrine of Necessity and, 145, 148, 160-164, 656 Servitudes 189-191 --- Extinction of, 190 ---, Military and Economic, 189 ---, Positive and Negative, 189 Settlement of Disputes 500-507 ---, Pacific and Compulsive, 374-376 Ships, Transfer of, 530 Sick and Wounded 542

Sikkim 92

Skyjacking 240-244

Rules in Sea Warfare 553 Rules of War 542, 640 Russsel's case, Earl, 222 Russian Indemnity Case 298, 338, 468 Russian Socialist Federated Soviet Republic v. Cibrario, 28, 132

Soblen case, The, 277, 679, 680 Sources of International Law 19-29 ---, South Africa, Racial Bloodbath in, 412 -, Revocation of Mandate for, 99-101 South-East Asia Collective Defence Treaty 165, 395, 435, 436 South-West Africa, Admissibility of the hearings of petitioners by the Committee on, 494 -Case filed by Ethiopia and Liberia against-for Declaration re. mandate 391, 494, 691 -International Status of, 98, 101, 145, 402, 690 -Advisory opinion International Court of Justice on 101, 145, 391 -The Legal consequences for States of the Continued presence of South Africa in Namibia 101, 145, 378, 392, 494 -- Voting procedure on questions relating to reports and petitions concerning the territory of, 49;, 494, 690, 70: Sovereign Immunity 684, 685 Sovereignty 382 --, over the Air, 185-188 Soviet Intervention in Hungarian Affairs 149, 150 411 -System of Collective Security, The, 528, 534

Soufracht (V/O) case 522, 525, 526, 527, speciality, Principle or Rule of 269, 6 4, 675 Specialized Agencies 393, 460-16; Spheres of Influence 215 Sprngbok 616 Spy 640 Staaten bund 87 Starke, J. G. 4, 5 State Immunity 685, 696 State of West Bengal v. Jugal Kisho: More 271, 272, 681-6 14 State papers, International, 28, 29

State Succession, 136-145, 645, 646, 652, 653 --, Consequences of, 137-145 State Territory 164-191, 666, 667 --, Loss of, 216 - -, Modes of Acquiring, 198-216 Statelessness, 60, 259-261, 286, 673 -- United Nations Convention on the Reduction of, 60 States in General 81-107 -- Dependent, 86 --, Equality of, 84, 85 ---, Independence of, 82 -- Independent, 85 independence --Sovereignity and of, 82 States, Recognition of, 113 135 Statham v. Statham and The Gaekwar of Baroda 224 1931, 108, Statute of Westminster 109 Stay and Repairs of Warships 596 Stigstad, The, 607, 702, 703 Stimson's Doctrine of Non-recognition, 127 Stoeck v. Public Trustee 253, 259, 673, 674 Straits, 173, 174

Tarasov Extradition Case, The, 6: 0 Taiwan 201-204 Tashkent Declaration 418 Techt v Hughes 516 Teheran Conference 358 Terlinden v. Ames 270 Termination of diplomatic mission 316, 317 Termination of Treaties 337 Termination of War 581-583, 701 1 crritorial Asylum 273, 297, 311, 312 Lerritorial Jurisdiction 656, 657 Territorial Sea, Breadth of, 183, 184 ---, Convention on, 58 - , Regime of the, 57, 58, 183, 671 Territorial Sovereignty, Limitation of, 164, 644 Territorial Waters 174, 175, 665, 666 Territory, State, 164-1:1, 666, 667 Text-Writers 26 Thalweg 166, 167 Thirty Hogsheads v. Boyle 25, 526 Tibet 88-90, 162 Tiran Territorial Waters 193-196, 419 Straits of Magellan 192 Stra tegem 542, 543 Strategic areas 392, 401, 723 Strategic Arms Limitation Talks 454, Subject-matter of International Law Subjects of International Law 78-80 Subjugation 212, 213, 216, 255 Submarines 551, 552 Subsoil under the sea 220, 221 Substitution 259 Succession, State, 136-145, 655, 656 Succession in case of dismemberment 144 Succession in international organisation 145 Suez Canal, The, 168-170, 175, 193, 194, 411 Sujets mixtes 257 Sultan of Johore v. Abubakar Tunku 122 Surrender of their own subjects 265 Survey of Security Council at Work 404-427 Suspension of Arms 582 Sydney Cotton, Flight of, 188 Syria 407 Switzerland 102

T

Tlateloco, Treaty of, 455 Tobar Doctrine of Recognition 127 Tokyo Convention 242 Tokyo Trial 571-573, 701 Total War 508, 613, 6.4 Torts 348-350, 646, 669 Transfer of ships 630 Transformation Theory 68, 69 Treaties 20, 325-346 --- Amendment or modification of, 336 ---Commercial, 346 -Effect of War on, 516-518 -- Interpretation of, 343-346 \_\_Kinds of, 326 --Vienna Convention on the Law of, 62, 63, 330 Limi tation, 1972, Treaty on Arms U. S.-Soviet, 456 Trek, The, 597 Tribunals 24 Truce 582 Truman Declaration 177 Trust 98

Trust Territories 97-102, 390, 391
Trusteeship Council 97, 389, 390, 711, 724, 725
Trusteeship system 286, 400, 722-725
Tunis-Morecco Nationality Decrees 91

Tunisia 411
Turkey, Agreements for Military Aid
signed between U. S. A. and, 439
Two Freedoms agreement 188

U

U-Boats, Scuttled, 701 UNESCO 462 U. N. O. Recognition and the, 132, 135 United Nations 357-404, 413, 709-728 -- and the League 384 -- Constitution of the 364 -- Charter 709-728 - - Law in the, 383 -- Injuries in Service of (1949) 491 --, Legal Status of, 381, 382 --, Membership (1948 49) U. N. Convention on the Prohibicion of 'Pacteriological and Arms 456 United Nations Declaration 358 U. N.. Review of the activities of the, 402-404 l'mitas, The, 533 United Nations Educational, Scientific and Cultural Organization (UNESCO) 462 Uniting for Peace Resolution 371-

United States of America v. McRae 653, 654 inited States v. Ford 251 United States v. Rauscher 250, 269, 270 United States v. Valentine 701 Universal Declaration of Human Rights 39, 63, 244, 286-290 Universal Postal Union (U. P. U.) 463 Unneutral Service 607, 615, 618-621 707, 708 Universal Succession 136 Unrecognised State, Disabilities of, U. S.-Japanese Defence Pact 436 U. -Philippines Mutual Defence reaty 438 U. S.-Soviet Treaty on Arms Limitation, 1972, 456 U. S. A. v. Rauscher 269, 674 U. S. v. The Schooner I.aw Jeune Uagenie 24 Usage 21, 22 Uti Possideties 582

Vassal State, 88
Vatican City 105-107
Vattel 8, 27, 36, 45, 586, 610
Venezuela 88
Vote, Double, 378-380
Veto Right 376-380, 401
Vienna, 1815, Congress of, 37, 167, 300
Vienna Convention on Consular Relations, 1963, 62, 320
Vienna Convention on Diplomatic Relations, 1961, 61, 62, 299, 303, 309, 311

373

Vienna Convention on the Law of Treaties 62, 63, 330, 334, 336, 342, 344

Virginius, The, 665

Visit and Search, The Right of, 197, 198, 530, 621-623

Vitoria 42

Volkerrecht 1

Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa 492, 690

Vrow Anna Catherina 251

W

War, Kinds of, 509

—Total, 509

War Crimes 56

War Criminals,
Warfare, Laws
War and its Effects 508-518

War Crimes 56

War Crimes 565-577, 700, 701
War Criminals, Asylum for, 577
Warfare, Laws of the Land, 535-543
——Laws of, Air, 560-565

-, Laws of Maritime, 549-554 Warsaw Convention, 187 Warsaw Treaty 147, 163, 422, 437,

Warships, Stay and Repairs of, 596 Washington The, 705 Washington Conference, 61, 705 -- on the Limitation of Armaments 552

Washington Treaty 535 -Naval Treaty, 1922, 565 West Bengal, State of, v. Jugal Kishore More 271, 272, 681-684

West Rand Central Gold Mining Co. I.td. v. The King 5, 70, 141, 645, 646

Western European Union 435, 438

Westminster, Statute of, 108 William Mackenzie Claim 257 Wimbledon, the S. S. 20, 171, 190, 191, 327, 343, 345, 471, 671 Wireless Communications 188, 297 Withdrawal of recognition 131 Withdrawal f om League 354 Withdrawal from U. N. O. 367-371 Wolff, 36, 44, 45

World Health Organization (W.H.O.) 463

World Meterological Organization 463, 464

Wounded, Sick and, 535, 542, 583, 628

Wulfson v. Russian Socialist Federated epublic 115

is hereby

Yalta Conference 3 1, 566 Zacharia v. Republic of Cyprus 267, 681 Zamora, The, 70, 527, 558, 594, 599, 602. Zouche 27, 35, 44 607, 698-700, 702 Allama Igbal Library 111727